Supreme Court, U.S.
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OFFICE OF

IN THE

# Supreme Court of the United States

HAHN AUTOMOTIVE CORPORATION,
doing business as Autoworks, Inc.,

*Petitioner,*

*v.*

KENNETH A. TAKACS, ANDREW EVANS, LLOYD K. GALLOWAY, KATHY GRIFFITH, URSULA F. HOOKER, ANITA L. NEWMAN, DAVID H. ELEY, JANET FLEGEL, STEVEN D. BROWN, DAVID S. BRADNER, DAVID MICHAEL, MARK A. FLANNERY, JERRY S. MATHEWS, AARON T. PRICE, DENNIS M. MISIK, ERNEST E. ALLEN, ROGER DEAN KELLY, KEVIN WAYNE SIMMERS, FRANK T. MUSCARELLA, JR., ARVIL NOLE, JR., JONATHAN E. WOOD, MICHAEL W. TIMMERMAN, LEO P. WINCE, JAMES L. TEAGUE, WILLIAM ROBERT UNDERWOOD, CLIFFORD D. JOHNSON,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Under the "salary basis test" of 29 C.F.R. § 541.118, interpreting the "white-collar exemptions" of the Fair Labor Standards Act at 29 U.S.C. § 213(a)(1), employers whose disciplinary policies subject administrative, professional, and executive employees to unpaid disciplinary suspensions in increments of less than a week must pay overtime to these employees. However, 29 C.F.R. § 541.118(a)(6) provides a "window of correction" under which an employer that has made deductions from employees' pay that would remove the employees from exempt status may retroactively restore their exempt status by reimbursing the employees and promising to comply with the salary basis rule in the future.

The question presented is whether the "window of correction," in accordance with the plain language of the regulation, is available to employers that have a policy or practice of making more than a single improper deduction.

## STATEMENT PURSUANT TO RULE 29.6

Petitioner Hahn Automotive Corporation states that it has no corporate parents, and that no publicly held company owns ten percent or more of Hahn Automotive Corporation's stock.



## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| Statement Pursuant to Rule 29.6 | ii |
| Table of Contents | iii |
| Table of Cited Authorities | v |
| Table of Appendices | ix |
| Opinions Below | 1 |
| Statement of Jurisdiction | 1 |
| Statutory and Regulatory Provisions Involved | 1 |
| Statement of the Case | 2 |
| Reasons for Granting the Writ | 5 |
| I. Conflict Exists Among The Circuit Courts Of Appeal On The Application Of The FLSA "Window Of Correction." | 5 |
| A. The Plain Language Of The Regulation Demonstrates That The Window Of Correction Is Available Where Deductions Have Been Made For Reasons Other Than Lack Of Work. | 5 |

*Contents*


*Page*

B. The Window Of Correction Is Available Even Where Multiple Deductions Have Been Made Pursuant To An Established Policy. ..... 8

C. The Secretary Of Labor's Interpretation Is Not Entitled To Deference. ..... 13

1. The Rigid Interpretation Of The Window Of Correction Regulation Urged By The Secretary Contradicts The Regulation's Plain Reading. .. 13

2. The Secretary's View Of When The Window Of Corrections May Be Utilized Negates The Underlying Remedial Purpose Of The Regulation. ..... 15

Conclusion ..... 18




## TABLE OF CITED AUTHORITIES


*Page*

**Cases:**

*Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991) ..... 7

*Arrington v. City of Macon*, 973 F. Supp. 1467 (M.D. Ga. 1997) ..... 11

*Auer v. Robbins*, 519 U.S. 452 (1997) ..... *passim*

*Balgowan v. New Jersey Department of Transportation*, 115 F.3d 214 (3d Cir. 1997) ... 10

*Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 604 F. Supp. 962 (E.D. Pa. 1985) ..... 15, 16

*Childers v. City of Eugene*, 120 F.3d 944 (9th Cir. 1997) ..... 7, 9

*Davis v. City of Hollywood*, 120 F.3d 1178 (11th Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998) ..... 10

*DiGiore v. Ryan*, 172 F.3d 454 (7th Cir. 1999) .... 9, 10

*Dole v. Malcolm Pirnie, Inc.*, 758 F. Supp. 899 (S.D.N.Y. 1961) ..... 14, 17

*Hartman v. Arlington County*, 903 F.2d 290 (4th Cir. 1990) ..... 7, 11

*Cited Authorities*

*Page*

*International Assn. of Fire Fighters, Alexandria Local 2141 v. City of Alexandria*, 720 F. Supp. 1230 (E.D. Va. 1989), *aff'd*, 912 F.3d 463 (4th Cir. 1990) ..... 12

*Jackson v. Kentucky*, 892 F. Supp. 923 (E.D. Ky. 1995) ..... 11, 12, 17

*Johnson v. Chicago Housing Authority*, Nos. 94-C-7692, 97-C-3584, 1997 U.S. Dist. LEXIS 19001 (N.D. Ill. Nov. 19, 1997) ..... 10

*Klein v. Rush-Presbyterian-St. Lukes's Med. Ctr.*, 990 F.2d 279 (7th Cir. 1993) ..... 7

*Klem v. County of Santa Clara*, 208 F.3d 1085 (9th Cir. 2000) ..... 12

*Kuchinskas v. Broward County*, 840 F. Supp. 1548 (S.D. Fla. 1993), *aff'd*, 86 F.3d 1168 (11th Cir. 1996), *cert. denied*, 519 U.S. 1148 (1997) ..12, 16, 17

*Lee v. Flightsafety Servs. Corp.*, 20 F.3d 428 (11th Cir. 1994) ..... 7

*Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 506 U.S. 905 (1992) ..... 7

*Martin v. W.E. Monks & Co.*, No. 92-3739, 1993 U.S. App. LEXIS 20610 (6th Cir. Aug. 3, 1993) .... 7, 15

*Cited Authorities*

*Page*

*Paresi v. City of Portland*, 182 F.3d 665 (9th Cir.), *cert. denied*, 528 U.S. 874 (1999) ..... 8, 9, 16

*Reich v. IBP, Inc.*, No. 88-2171, 1996 U.S. Dist. LEXIS 3709 (D. Kan. Mar. 22, 1996) ..... 15

*Simmons v. Fort Worth*, 805 F. Supp. 419 (N.D. Tex. 1992) ..... 12

*Spradling v. City of Tulsa*, 95 F.3d 1492 (10th Cir. 1996), *cert. denied*, 519 U.S. 1149 (1997) ..... 7

*Whetsel v. Network Property Services*, 246 F.3d 897 (7th Cir. 2001) ..... 10, 12

*Yourman v. Giuliani*, 229 F.3d 124 (2d Cir. 2000) ... 12

**Statutes:**

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. § 1331 ..... 5

29 U.S.C. § 207(a)(1) ..... 2

29 U.S.C. § 213(a)(1) ..... i, 1, 2, 4

*Cited Authorities*

*Page*

**Other Authorities:**

29 C.F.R. § 541.1 ..... 1, 2

29 C.F.R. § 541.2 ..... 1, 2

29 C.F.R. § 541.3 ..... 1, 2

29 C.F.R. § 541.118 ..... i

29 C.F.R. § 541.118(a) ..... 2

29 C.F.R. § 541.118(a)(2) ..... 3, 4

29 C.F.R. § 541.118(a)(3) ..... 3, 4

29 C.F.R. § 541.118(a)(4) ..... 4

29 C.F.R. § 541.118(a)(5) ..... 3, 4

29 C.F.R. § 541.118(a)(6) ..... i, 3, 6, 13

29 C.F.R. § 825.206 ..... 3

57 Fed. Reg. 37666 (Aug. 19, 1992) ..... 16

## TABLE OF APPENDICES

*Page*

Appendix A — Opinion Of The United States Court Of Appeals For The Sixth Circuit Dated, Decided And Filed April 13, 2001 ..... 1a

Appendix B — Decision And Entry Of The United States District Court For The Southern District Of Ohio, Western Division Dated, Decided And Filed April 16, 1997 ..... 17a

Appendix C — Statutory And Regulatory Provisions ..... 44a

Appendix D — Memorandum Opinion And Order Of The United States District Court For The Northern District Of Illinois, Eastern Division In *Johnson, Etc. v. Chicago Housing Authority, et al.* Dated, Decided And Entered November 19, 1997 And Docketed November 24, 1997 ..... 50a

Appendix E — Opinion Of The United States Court Of Appeals For The Sixth Circuit In *Martin, Etc. v. W.E. Monks & Company, et al.* Dated And Filed August 3,1993 ..... 63a

Appendix F — Memorandum And Order Of The United States District Court For The District Of Kansas In *Reich, Etc. v. IBP, Inc.* Dated And Filed March 21, 1996 And Entered March 22, 1996 .. 77a

Petitioner respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit that gives rise to this petition is reported at 246 F.3d 776 (6th Cir. 2001) and appears in the Appendix at 1a.

The decision of the United States District Court for the Southern District of Ohio is unreported, and is reproduced in the Appendix at 17a.

## STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and judgment on April 13, 2001. No petitions for rehearing or hearing en banc were filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 213(a)(1) of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. § 213(a)(1), exempts bona fide executive, administrative, and professional employees from the overtime pay requirements of the Act, and is reproduced in the Appendix at 44a. The Secretary of Labor's definitions of "executive," "administrative," and "professional" employees are found at 29 C.F.R. §§ 541.1, 541.2, and 541.3 and are reproduced in pertinent part at pages 44a through 46a

in the Appendix. The Secretary of Labor's regulations concerning the "salary basis test," 29 C.F.R. § 541.118(a), are set forth in the Appendix at 46a through 49a.

## STATEMENT OF THE CASE

Under the Fair Labor Standards Act, an employer must pay an employee at one and one-half times that employee's regular rate of pay for all hours worked in one week in excess of forty hours, unless that employee is exempt from the Act. 29 U.S.C. § 207(a)(1). The FLSA exempts from its overtime requirements any employee employed in a "bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1).

In order for an employee to fit within the overtime-exempt category for executive, administrative, or professional employees under the regulations, the employee must be paid on a "salary basis." 29 C.F.R. §§ 541.1-.3. App. 46a.

Under the regulations, an employee is considered to be paid "on a salary basis" if the employee "regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a), App. 46a. As a general rule, an employee paid "on a salary basis" must "receive his full salary for any week in which he performs any work without regard to the number of days or hours worked," but need not be paid for any week in which he performs no work. *Id.*

There are a few exceptions to that general rule. One is that "deductions may be made . . . when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident." 29 C.F.R. § 541.118(a)(2), App. 47a. "Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences." *Id.* "Deductions may also be made for absences of a day or more occasioned by sickness or disability . . . if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability." 29 C.F.R. § 541.118(a)(3), App. 47a. Finally, an employer may make deductions from an employee's salary for "infractions of safety rules of major significance," 29 C.F.R. § 541.118(a)(5), App. 48a, or for absences taken pursuant to the Family and Medical Leave Act, 29 C.F.R. § 825.206, without affecting an employee's salaried status.

The regulations also contain a corrective provision known as the "window of correction" through which an employer may remedy certain improper deductions from the salaries of exempt employees. 29 C.F.R. § 541.118(a)(6). App. 48a.

Respondents are twenty-seven former store managers and senior assistant managers who were employed at various Autoworks, Inc. ("Autoworks") store locations throughout a seven-state region.[1] As managers, Respondents were

1. Autoworks was a company engaged in the retail selling of automotive parts and products. Autoworks was acquired by Petitioner from Northern Automotive Corporation on November 29, 1993. At the time of the acquisition, Autoworks had 159 retail stores and a distribution center; and employed over 1400 employees. App. 3a.

considered exempt from the overtime provisions of the FLSA pursuant to 29 U.S.C. § 213(a)(1). JA 43.[2]

In May of 1995, as a result of a lawsuit filed against Autoworks' prior owner, Northern Automotive, Petitioner learned that Northern Automotive may have had a policy at Autoworks which allowed store managers and senior assistant managers to be suspended without pay for disciplinary reasons. JA 43.

Petitioner immediately investigated whether any such disciplinary policy existed at Autoworks and learned that a Northern Automotive policy providing for disciplinary suspensions without pay did exist at Autoworks. Utilizing the "window of correction," Petitioner instituted its own policy which complied with the FLSA, and reimbursed the seven managers who had received improper salary deductions. JA 43-45.

Subsequently, Respondents sued Petitioner, claiming that the prior Northern Automotive policy was not consistent with the salary basis test and, therefore, that they were not exempt employees. *See* 29 C.F.R. § 541.118(a)(2)-(5).

On cross motions for summary judgment, the District Court ruled that Respondents were nonexempt employees because their salaries had been subject to impermissible unpaid suspensions under the Northern Automotive policy in violation of the salary basis test; and that Petitioner could not avail itself of the regulatory "window of correction" to remedy the seven improper suspensions without pay.

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2. Citations to the Joint Appendix, filed in the Sixth Circuit in this case, are designated as "JA ___."

App. 34a. Accordingly, the District Court granted summary judgment to Respondents. App. 42a. (The District Court's jurisdiction arose under 28 U.S.C. § 1331.)

The Sixth Circuit Court of Appeals affirmed the District Court's opinion, noting that the issue of whether the "window of correction" was available to employers with either a policy or practice of making improper deductions had not yet been addressed by this Court. App. 12a.

## REASONS FOR GRANTING THE WRIT

### I.

### CONFLICT EXISTS AMONG THE CIRCUIT COURTS OF APPEAL ON THE APPLICATION OF THE FLSA "WINDOW OF CORRECTION."

#### A. The Plain Language Of The Regulation Demonstrates That The Window Of Correction Is Available Where Deductions Have Been Made For Reasons Other Than Lack Of Work.

The salary basis test regulations promulgated by the Department of Labor ("DOL") in 1954 contain a remedial provision that employers may invoke in order to preserve employees' exempt status where deductions run afoul of the salary basis test and its myriad technical rules. It is, in essence, an equitable make-whole remedy, whereby the employer can reimburse affected employees and avoid a liability windfall. Known as the "window of correction," the regulation provides:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts of the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. *On the other hand,* where a deduction not permitted by these interpretations is inadvertent, *or is made for reasons other than lack of work,* the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

29 C.F.R. § 541.118(a)(6) (emphasis added). Under the plain language of this regulation, the window of correction is generally available to an employer who undertakes corrective action if the deductions at issue are "made for reasons other than lack of work."

In *Auer v. Robbins*, 519 U.S. 452 (1997), the Supreme Court affirmed the broad scope and availability of the window of correction under its plain language. Rejecting the notion that the defense is available only where deductions are inadvertent, the Court ruled that " 'inadverten[ce]' and 'made for reasons other than lack of work' [are] *alternative* grounds for permitting corrective action" under the regulation. *Id.* at 463 (emphasis added). The "window" was therefore available in *Auer* to preserve the exempt status of the employee who had suffered a partial workweek suspension.

Prior to *Auer*, courts had split on the question whether "inadvertence" was required to take advantage of the window of correction. Some courts, following *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991), read the regulation conjunctively despite its plain disjunctive application. These courts required inadvertence, holding that the defense was unavailable where a policy allowing impermissible deductions was in place. *See, e.g., Spradling v. City of Tulsa*, 95 F.3d 1492 (10th Cir. 1996), *cert. denied*, 519 U.S. 1149 (1997); *Klein v. Rush-Presbyterian-St. Lukes's Med. Ctr.*, 990 F.2d 279 (7th Cir. 1993); *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 506 U.S. 905 (1992); *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991). Other courts read the regulations disjunctively, allowing the defense any time deductions had been made for reasons other than lack of work, regardless of inadvertence. *See, e.g., Lee v. Flightsafety Servs. Corp.*, 20 F.3d 428 (11th Cir. 1994); *Martin v. W.E. Monks & Co.*, No. 92-3739, 1993 U.S. App. LEXIS 20610 (6th Cir. Aug. 3, 1993); *Hartman v. Arlington County*, 903 F.2d 290 (4th Cir. 1990).

*Auer* expressly rejected the conjunctive reading of the regulation, overruling *Abshire* and its progeny. *See Childers v. City of Eugene*, 120 F.3d 944, 947 (9th Cir. 1997). *Auer* thus discredits the entire line of cases disallowing the window of correction based on *Abshire*'s reasoning, including *Spradling*, *Klein* and *Malcolm Pirnie*. Instead, *Auer* affirms the disjunctive language of the regulation, which allows an employer to reimburse employees and preserve the exemption not only for inadvertent deductions, but also for deductions "made for reasons other than lack of work." *Auer*,

519 U.S. at 463. *Auer* thus implicitly endorses the many decisions preceding it in which the courts read the plain language of the regulation disjunctively and allowed corrections where impermissible deductions have been made "for reasons other than lack of work," as in the case of partial workweek disciplinary suspensions.

### B. The Window Of Correction Is Available Even Where Multiple Deductions Have Been Made Pursuant To An Established Policy.

Despite the clarity of the language of the regulation, the Sixth Circuit Court ruled that the window of correction was not available to Petitioner. Deferring to the interpretation of the regulations presented by the Secretary of Labor in its *amicus* brief, the Court held that the defense was not available because Petitioner had engaged in a pattern of seven improper disciplinary deductions pursuant to a policy. *Auer*, of course, involved a single deduction and does not specifically address the basis for the Sixth Circuit's ruling. However, in the four years since the *Auer* decision, several circuits have concluded that the window of correction is available even where there have been multiple impermissible disciplinary deductions.

In the Ninth Circuit case, *Paresi v. City of Portland*, 182 F.3d 665 (9th Cir.), *cert. denied*, 528 U.S. 874 (1999), employees sued the City for overtime under the FLSA, contending that they were subject to partial workweek disciplinary suspensions and thus, should be treated as non-exempt employees. Of the sixty-two plaintiffs, two had been suspended without pay for less than one week and four had been threatened with such sanctions. *Id.* at 667.

The Ninth Circuit rejected the plaintiffs' argument "that the window of correction is not available when the employer maintains a 'pattern . . . or policy of impermissible disciplinary deductions.' " *Id.* at 668. The court found that "two actual instances of arguably impermissible deductions . . . would not sustain a finding of such a pattern or policy." *Id.* The Court stated that even if the deductions showed a pattern or policy, the defense was nevertheless available:

> *In any event*, the text of the regulations contains no such limitation [that the defense is unavailable where a pattern or policy exists]. "[T]he plain language of the regulation sets out 'inadverten[ce]' and 'made for reasons other than lack of work' as alternative grounds permitting corrective action."

*Id.* (emphasis added) (quoting *Auer*, 519 U.S. at 463, and citing *Childers*, 120 F.3d at 947). Because the deductions at issue were disciplinary in nature, they were "made for reasons other than lack of work" and were thereby covered by the window of correction. *See Paresi*, 182 F.3d at 668.

The Seventh Circuit adopted a similar reading of the window of correction in *DiGiore v. Ryan*, 172 F.3d 454 (7th Cir. 1999). In that case, ten police officers sued for overtime under the FLSA. Five of the plaintiffs had suffered partial workweek disciplinary suspensions. The *DiGiore* court found that five disciplinary suspensions were insufficient to render the *entire class* of police officers "subject to" impermissible deductions. The court also found that "[e]ven if these five incidents rose to the level of frequent and, thus, *constituted an actual practice*," the employer was absolved of liability

because it had "availed [itself] of the regulatory 'window of correction.' "[3] *Id.* at 465 (emphasis added).

In *Davis v. City of Hollywood*, 120 F.3d 1178 (11th Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998), nineteen management employees sued the City for overtime pay based on impermissible disciplinary suspensions. The record showed a total of six disciplinary suspensions, two of which were in week-long increments. *Id.* at 1180. The Eleventh Circuit found that the window of correction was available, reasoning that these multiple deductions had been made "for disciplinary suspensions, not for lack of work." *Id.*

The Third Circuit in *Balgowan v. New Jersey Department of Transportation*, 115 F.3d 214 (3d Cir. 1997), observed that if disciplinary deductions had been made, the employer could have used the window of correction to preserve the employees' exempt status.

Relying on the Supreme Court's *Auer* decision, district courts have similarly concluded that the window of correction is available in cases involving a pattern or practice of impermissible deductions. In *Johnson v. Chicago Housing Authority*, Nos. 94-C-7692, 97-C-3584, 1997 U.S. Dist. LEXIS 19001 (N.D. Ill. Nov. 19, 1997), App. 50a, the employer admitted that it had "improperly docked numerous plaintiffs' salaries and that it did so pursuant to an established policy." *Id.* at *8. The court held that the window of correction nevertheless was available, expressly rejecting the

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3. The Seventh Circuit in *Whetsel v. Network Property Services*, 246 F.3d 897 (7th Cir. 2001), overruled this alternate holding because the *DiGiore* court "might not have had [the Secretary's] argument before it."

interpretation of the regulations that the window of correction was unavailable in cases of a pattern or practice of impermissible deductions. Instead, the court interpreted *Auer* as making the window of correction generally available, the only exception being where deductions are taken because of a lack of work. *Id.* This result, the court reasoned, not only "comports with the plain language of the regulation, it immunizes employers who mistakenly adopt policies permitting prohibited deductions, and it saves large employers, like municipalities, from the expense of FLSA liability caused by the repeated and intentional actions of ill-informed supervisors." *Id.* at *11 n.1.

Similarly, in *Arrington v. City of Macon*, 973 F. Supp. 1467 (M.D. Ga. 1997), a FLSA overtime case brought by thirty-nine police officers, the court determined that, based on six partial workweek disciplinary suspensions and three deductions for tardiness, the City had an actual policy and practice of impermissible disciplinary deductions, in violation of the salary basis test. *Id.* at 1469-71, 1473-74. Even so, the court ruled that the window of correction preserved the plaintiffs' exempt status, rejecting the plaintiffs' argument that it is not available "to correct an established policy." *Id.* at 1474.

These post-*Auer* decisions are consistent with the substantial body of pre-*Auer* case law that adopts the disjunctive reading of the regulation endorsed by *Auer*, and confirms the availability of the window of correction where multiple deductions have been made pursuant to an established, long-term policy or practice. *See Hartman v. Arlington County*, 903 F.2d 290 (4th Cir. 1990) (thirty-four plaintiffs, seven impermissible deductions pursuant to written policy); *Jackson v. Kentucky*, 892 F. Supp. 923,

936-37 (E.D. Ky. 1995) (three deductions pursuant to "longstanding policy" in exempt work force of 155); *Kuchinskas v. Broward County*, 840 F. Supp. 1548 (S.D. Fla. 1993), *aff'd*, 86 F.3d 1168 (11th Cir. 1996), *cert. denied*, 519 U.S. 1148 (1997) (seven suspensions among one hundred seventeen plaintiffs, seventy-three suspensions in exempt work force of two thousand); *Simmons v. Fort Worth*, 805 F. Supp. 419 (N.D. Tex. 1992) (two hundred deductions pursuant to "long-running policy" in exempt work force of one thousand); *International Assn. of Fire Fighters, Alexandria Local 2141 v. City of Alexandria*, 720 F. Supp. 1230 (E.D. Va. 1989), *aff'd*, 912 F.3d 463 (4th Cir. 1990) (twenty-six impermissible deductions pursuant to city's administrative regulation).

In contrast, the courts in *Klem v. County of Santa Clara*, 208 F.3d 1085 (9th Cir. 2000), *Yourman v. Giuliani*, 229 F.3d 124 (2d Cir. 2000), and *Whetsel v. Network Property Services*, 246 F.3d 897 (7th Cir. 2001), found that a policy or practice of impermissible disciplinary deductions foreclosed the employer's opportunity to correct such violations. In these cases, the Secretary submitted amicus briefs arguing that the window of correction is available only for one-time or inadvertent deductions, and the courts deferred to the Secretary's interpretation. However, the interpretation offered by the Secretary is inconsistent with the plain language of the regulation and, thus, is not entitled to deference.

## C. The Secretary Of Labor's Interpretation Is Not Entitled To Deference.

### 1. The Rigid Interpretation Of The Window Of Correction Regulation Urged By The Secretary Contradicts The Regulation's Plain Reading.

The Secretary's interpretation of the regulation is entitled to deference only if it is not "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal quotations omitted). Here, the interpretation of the Secretary is inconsistent with the regulation because it conflates the "inadvertence" and "made for reasons other than lack of work" prongs of the window of correction regulation, prongs that *Auer* requires be read in the alternative, effectively requiring that *all* improper deductions be inadvertent. The regulation, by contrast, states that in general, "[t]he effect of making a deduction which is not permitted under these interpretations *will depend upon the facts in the particular case.*" 29 C.F.R. § 541.118(a)(6) (emphasis added). Under the regulation, intention is an issue only when an employer *generally* makes deductions when no work is available; such deductions "indicate[ ] that there was no intention to pay the employee on a salary basis." *Id.* (emphasis added) "*On the other hand,* where a deduction not permitted by these interpretations . . . is made for *reasons other than lack of work*, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." *Id.* (emphasis added). The regulation thus clearly contrasts deductions generally made for lack of work, which demonstrate a lack of intent to pay employees on a salary basis, and intentional deductions made for other reasons, which do not.

The regulation does not indicate, as the Secretary claims, that corrective action is only available for a "one-time" deduction which is inadvertent or made for a reason other than a lack of work.[4] In fact, the regulation defines the requisite corrective action in terms of multiple deductions: "the employer reimburses the employee for such *deductions* and promises to comply in the future." *Id.* (emphasis added). Thus, correction of multiple deductions is expressly contemplated by the regulation.

Furthermore, the Secretary's interpretation not only eviscerates this Court's holding in *Auer* — that the window of correction is available to remedy impermissible deductions made for reasons other than lack of work — but also "presents a tautology from which no employer could possibly escape:"

> The employees are not salaried because impermissible deductions were made. Those deductions are impermissible (and not excused

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4. The rule urged by the Secretary is too rigid. The regulation, by requiring an examination of the facts of a particular case, indicates a more fluid approach. *Dole v. Malcolm Pirnie, Inc.*, 758 F. Supp. 899, 904 (S.D.N.Y. 1961). Under the Secretary's interpretation, a policy or practice of disciplinary deductions precludes consideration of facts which would show the employer's intent to pay on a salary basis, such as whether deductions are made for absences due to illness, personal reasons, jury duty or military duty; or whether employees are paid a consistent amount regardless of the number of hours worked. Here, there is no contention that Petitioner's pay practices were inconsistent with the salary basis test, other than the seven disciplinary suspensions. Such partial week disciplinary suspensions, by themselves, fail to demonstrate a general intent by an employer not to pay its entire work force of exempt employees in general, or the employees who have been suspended in particular, on a salary basis.

> under the 'window of correction') because employees have been found to be not salaried. If . . . the [ ] deductions could be excused under the window of correction if not for the earlier finding of non-salaried status, then it follows that those deductions should not be considered in making the pay status finding.

*Martin v. W.E. Monks & Co.*, No. 92-3739, 1993 U.S. App. LEXIS 20610 at *17 (6th Cir. Aug. 3, 1993) (Merritt, C.J., dissenting). App. 63a.

**2. The Secretary's View Of When The Window Of Corrections May Be Utilized Negates The Underlying Remedial Purpose Of The Regulation.**

The window of correction operates as an equitable remedy for all parties in salary basis test litigation. It provides at once a defense to employers that prevents loss of exempt status and the imposition of massive liability, a make-whole remedy for those *otherwise exempt* employees who experienced impermissible disciplinary deductions from salary, and quasi-injunctive relief for the exempt work force as a whole through employer assurances of future FLSA compliance.

The effect of the Secretary's interpretation is to allow employees to seek punitive rather than make-whole remedies. Punitive remedies are inconsistent with the purpose of the FLSA, which is to make employees whole for their injuries. *See, e.g., Reich v. IBP, Inc.*, No. 88-2171, 1996 U.S. Dist. LEXIS 3709 (D. Kan. Mar. 22, 1996) App. 77a (purpose of FLSA award is to make whole, not punish); *Berndt v. Kaiser*

*Aluminum & Chemical Sales, Inc.*, 604 F. Supp. 962, 965 (E.D. Pa. 1985) (providing damages for losses not suffered would be punitive rather than remedial and inconsistent with the "make whole" policy of the FLSA).

Furthermore, the Secretary's interpretation is inconsistent with the DOL's previous acknowledgment of concerns "over the fundamental inequity of courts granting windfall awards of across-the-board retroactive overtime payments to [ ] employees who never had any actual deductions made in their salaries." *See* 57 Fed. Reg. 37666 (Aug. 19, 1992).

In this case, just seven of over four hundred managers had impermissible deductions from their salaries, made pursuant to a policy of the former owner of Autoworks. The remaining managers were completely unaffected. Because of these seven suspensions, the Petitioner now faces claimed liability of over one million dollars. Nearly all of this amount would go to individuals who lost no money whatsoever because of any regulatory violation. The window of correction provision is tailor-made for such a situation.

As the Ninth Circuit recognized in *Paresi*, application of the window of correction furthers "the policy underlying the administration of the salary basis test of 'avoid[ing] the imposition of massive and unanticipated overtime liability' " in such cases. *Paresi*, 182 F.3d at 668 (quoting *Auer*, 519 U.S. at 461). The window of correction thus prevents the "fundamentally unfair and inequitable" result of allowing "windfall awards of across-the-board retroactive overtime payments to [ ] employees who never had any actual deductions made in their salaries, along with employees who rarely had such deductions" taken. *Kuchinskas*, 840 F. Supp.

at 1557. Given the historically unstable state of the salary basis test and the great impact on both public and private employers, "it would be inequitable, to say the least, to so severely punish [an employer] for past violations of a relatively minor portion of the salary [basis] test" by ordering payment of overtime to those who are otherwise FLSA exempt. *Jackson v. Kentucky*, 892 F. Supp. at 937. The window of correction cures these inequities.

The decisions of the circuits precluding the window of correction thwart the FLSA's underlying policy and will have the effect of creating windfall recoveries for entire exempt work forces.[5] The proper remedy contemplated by the window of correction is to make whole those employees who had actual deductions taken and to clarify the employer's policies and practices to ensure future compliance.

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5. Although the FLSA's exemptions are to be narrowly construed, because it is a remedial statute its remedial provisions must be construed liberally so that the words will accomplish the purpose at which the act is aimed. *Dole v. Malcolm Pirnie, Inc.*, 758 F. Supp. at 904.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED, DECIDED AND FILED APRIL 13, 2001**

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

No. 99-4431

KENNETH A. TAKACS *et al.*,

*Plaintiffs-Appellees,*

*v.*

HAHN AUTOMOTIVE CORPORATION, doing business as AUTOWORKS, INC.,

*Defendant-Appellant.*

Appeal from the United States District Court
for the Southern District of Ohio at Dayton.
No. 95-00404 — Walter H. Rice, Chief District Judge.

Argued: December 1, 2000

Decided and Filed: April 13, 2001

Before DAUGHTREY and MOORE, Circuit Judges;
CARR, District Judge.*

* * *

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* The Honorable James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

*Appendix A*

## OPINION

KAREN NELSON MOORE, Circuit Judge. This case arises out of a claim for overtime pay brought under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, by twenty-seven former managers and senior assistant managers ("the managers")[1] at Autoworks, Inc. ("Autoworks"), a company engaged in the sale of automotive parts and products. On April 16, 1997, after reviewing the parties' cross motions for summary judgment, the district court granted partial summary judgment in favor of the managers and denied summary judgment for Defendant Appellant, Hahn Automotive Corporation ("Hahn"), which had acquired Autoworks in November of 1993, holding that the managers were non-exempt employees entitled to overtime compensation and that Hahn could not assert the "window of correction" defense to "preserve" exempt status for such managers. After resolving a number of further issues, the district court entered final judgment against Hahn and awarded damages to the managers on October 27, 1999.

Hahn now appeals the district court's judgment insofar as it concerns the partial grant of summary judgment regarding the managers' employment status and Hahn's ability to utilize the "window of correction" defense. For the reasons that follow, we **AFFIRM** the district court's decision that the managers were not exempt executive employees under the FLSA and that Hahn was not entitled to use the "window of correction" defense in this action.

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1. One of the managers, Helen Webb, was withdrawn as a plaintiff in this action prior to the entry of final judgment.

*Appendix A*

## I. FACTS

On November 29, 1993, Hahn acquired Autoworks, a company with 159 automotive retail stores, a distribution center, and more than 1,400 employees, from Northern Automotive Corporation. After purchasing Autoworks, Hahn did not issue new operational or personnel policies for the company but instead continued to use and implement Autoworks's existing policies, including its policy on corrective action or disciplinary policy. This disciplinary policy provided that employees of Autoworks were subject to suspensions without pay for misconduct on the job. The policy further explained that members of management were also subject to such punishment, specifying that "if the [suspended] associate is a *member of management*, [the supervisor must] inform [his/her] payroll representative that the associate has been suspended . . . . If the associate was suspended to discipline them for violating company policy, they should not be paid for scheduled time missed." Joint Appendix ("J.A.") at 278 (Store Operations Manual) (emphasis added). The managers in this case assert that they were aware of this disciplinary policy during their employment at Autoworks and that they believed they could be suspended without pay for disciplinary reasons. In fact, from November of 1993, when Hahn purchased Autoworks, to June of 1995, seven members of management, including three of the managers in this case, were suspended without pay for disciplinary infractions ranging from tardiness to failure to make a timely bank deposit. Additionally, for a total of twelve occasions, several members of management, including at least seven of the managers in this case, were threatened in writing with suspensions without pay because of disciplinary infractions.

*Appendix A*

In June of 1995, Hahn announced in a memorandum to all managers at Autoworks that it would not suspend any more managers without pay and that it would reimburse any managers who had suffered such suspensions.[2] According to Hahn, it was completely unaware of Autoworks's disciplinary policy until May of 1995 when another lawsuit was filed, and it immediately investigated and then eliminated the policy. Thereafter, Hahn reimbursed the seven managers who had been suspended without pay during the past year and a half for their lost wages.

Takacs and other managers filed suit in October of 1995, seeking unpaid overtime compensation due to them as a result of Hahn's violation of the FLSA, 29 U.S.C. § 207(a), plus liquidated damages and other appropriate relief. In considering the parties' cross motions for summary judgment, the district court granted the managers partial summary judgment on the grounds that they were non-exempt employees entitled to overtime compensation and

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2. The memorandum read in relevant part:

> It has come to our recent attention that when Autoworks, Inc. was owned by Northern Auto Corp. there may have been an unwritten policy that permitted managers and senior assistant managers to be suspended with no pay for various reasons. . . .
>
> Any senior assistant manager or manager who was suspended without pay since October, 1993, should be contacted immediately and immediate arrangements for payment of all lost wages will be made.

J.A. at 59.

that Hahn could not successfully assert the "window of correction" defense. The district court then granted Hahn leave to file a renewed motion for summary judgment regarding whether the applicable FLSA regulations were arbitrary and capricious and thus invalid and whether a two-year, not a three-year, statute of limitations was applicable in this case because Hahn's actions were not willful. On May 28, 1997, Hahn filed a motion for reconsideration of the district court's decision concerning the managers' employment status and Hahn's ability to assert the "window of correction" defense and filed a renewed motion for summary judgment as authorized by the district court. On March 30, 1998, the district court denied Hahn's motion for reconsideration as it concerned the managers' employment status under the FLSA and Hahn's ability to utilize the "window of correction" defense and denied Hahn's renewed motion for summary judgment as it concerned the validity of the applicable FLSA regulations. The district court, however, granted Hahn's renewed motion for summary judgment as it related to the question of Hahn's willfulness under the FLSA. Hahn then filed a motion for interlocutory appeal of the district court's partial grant of summary judgment in favor of the managers, which the district court denied. After holding trials on the issue of whether Hahn was an employer under the FLSA and on damages, the district court entered final judgment for the managers, ordering Hahn to pay the managers damages and their counsel reasonable attorneys' fees and costs. Hahn's timely appeal of the final judgment focuses on the issues of the managers' employment status and Hahn's ability to utilize the "window of correction" defense.

*Appendix A*

## II. ANALYSIS

We review de novo a district court's grant of summary judgment. *See Aiken v. City of Memphis*, 190 F.3d 753, 755 (6th Cir. 1999), *cert. denied*, 528 U.S. 1157 (2000). Summary judgment is proper only when there is no dispute as to a material question of fact and one party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c). Viewing all facts and inferences drawn therefrom in the light most favorable to the nonmovant, we then determine whether the evidence presented is such that a reasonable jury could find for that party. *See Aiken*, 190 F.3d at 755 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). In so doing, we review the district court's conclusions of law de novo and its findings of fact for clear error. *Id.*

### A. Exempt v. Non-Exempt Status

Hahn argues that the district court erred in determining that managers at Autoworks were not executive employees exempt from the FLSA overtime compensation provisions because Autoworks's disciplinary policy did not create a significant likelihood of pay deductions due to disciplinary infractions, and Autoworks had no actual practice of making such deductions. We disagree.

The FLSA provides that employees may not be required to work more than forty hours per seven-day week without overtime compensation at a rate not less than one and one-half times their regular pay. 29 U.S.C. § 207(a)(1). Workers who are employed in a bona fide executive, administrative,

or professional capacity, however, are exempt from this overtime compensation provision. 29 U.S.C. § 213(a)(1). Exemptions under the FLSA are narrowly construed against the employer. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Klem v. County of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000). Under the FLSA regulations, an employee must satisfy three short tests to be deemed an exempt executive, professional, or administrative employee: a (1) duties test; (2) salary level test; and (3) salary basis test. *See* 29 C.F.R. §§ 541.1, 541.1(f); 541.118; *see also* 29 C.F.R. §§ 541.2, 541.3.

The only test at issue in this case is the salary basis test, which provides that "[a]n employee will be considered to be paid 'on a salary basis' within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a). Under this test, pay deductions that are made because of disciplinary violations are impermissible except in one instance — if they are "imposed in good faith for infractions of safety rules of major significance." 29 C.F.R. § 541.118(a)(5).

In *Auer v. Robbins*, 519 U.S. 452 (1997), the Supreme Court adopted the Secretary of Labor's interpretation of when a category of employees is considered to have satisfied the salary basis test under the FLSA, holding that an employer has not demonstrated an objective intent to treat a category of employees as exempt from the FLSA where that employer

has an employment policy that creates a significant likelihood of disciplinary pay deductions or has an actual practice of making disciplinary deductions from such employees' pay. *See id.* at 461-63. *Auer* involved a claim for overtime pay by several sergeants and one lieutenant of the St. Louis Police Department, who maintained that they were not exempt employees under the FLSA because the city's police manual provided that department employees were subject to deductions in pay due to disciplinary infractions related to the quality and quantity of the work they performed and because one sergeant who had violated the city's residency requirement had actually received a deduction in pay for his infraction. *Id.* at 455, 463. In reviewing these officers' claims, the Supreme Court concluded that the officers were paid on a salary basis. The Supreme Court held that "[n]o clear inference [could] be drawn as to the likelihood of a sanction's being applied to" the officers because the city's police manual did not specifically identify the officers or other salaried employees as being subject to disciplinary pay deductions. *Id.* at 462. The Supreme Court explained that, in the absence of actual deductions, *see infra*, the Secretary's interpretation "require[d] a clear and particularized policy — one which 'effectively communicate[d]' that deductions [would] be made in specified circumstances" so as to "avoid[ ] the imposition of massive and unanticipated overtime liability . . . in situations in which a vague or broadly worded policy is nominally applicable to a whole range of personnel *but is not 'significantly likely' to be invoked against salaried employees.*" *Id.* at 461 (emphasis added). Thereafter, the Supreme Court concluded that no such policy existed in *Auer*. *Id.* at 462-63. Once the Supreme Court determined that there was neither a significant

likelihood of impermissible pay deductions nor an actual practice of making such deductions by the St. Louis Police Department, it then held that the department could preserve the exempt status of the *one* officer who had received a disciplinary pay deduction under the "window of correction" defense, even though such deduction was not inadvertent and the officer had not already been reimbursed. *Id.* at 463-64.

Applying the test adopted in *Auer* to this case, we conclude that managers at Autoworks were not exempt executive employees under the FLSA because Autoworks's disciplinary policy created a significant likelihood of pay deductions from managers due to disciplinary infractions, and Autoworks had an actual practice of making such deductions from managers. First, unlike in *Auer* and in *Aiken*, where we concluded that Memphis police captains were exempt salaried executives under the FLSA, the disciplinary policy in this case explicitly states that members of management, not simply all employees, are subject to pay deductions due to disciplinary infractions, providing that "if [a suspended] associate is a *member of management*, [the supervisor must] inform [his/her] payroll representative that the associate has been suspended. . . . If the associate was suspended to discipline them for violating company policy, they should not be paid for scheduled time missed." J.A. at 278 (Store Operations Manual) (emphasis added). Furthermore, the policy details the procedures necessary to suspend an associate, even members of management, without pay for disciplinary infractions. When viewed together, we believe that both of these factors made the possibility of disciplinary pay deductions for managers at Autoworks more than a mere theoretical possibility and further show that

Autoworks's policy "permit[ted] disciplinary or other deductions in pay 'as a practical matter.' " *Auer*, 519 U.S. at 461. *But see Ahern v. County of Nassau*, 118 F.3d 118, 121-22 (2d Cir. 1997) (reading *Auer* to require proof that a salaried employee's pay would be docked if they committed a specific infraction); *see also Stanley v. City of Tracy*, 120 F.3d 179, 184 (9th Cir. 1997) (concluding that there was no significant likelihood of impermissible deductions because the employer implemented a review practice to avoid policies impacting salary basis employees in a way that would violate the FLSA).

Indeed, we also conclude that Autoworks had an actual practice of making deductions in the pay of its managers. As the record reveals, over the course of a year and half, Autoworks, under Hahn's management, suspended seven members of management, including three of the managers in this case, without pay for a variety of disciplinary infractions. In other words, every three months, Autoworks suspended at least one management employee without pay for disciplinary reasons. Moreover, for a total of twelve occasions during this year and a half period, several members of management, including at least seven of the managers in this case, were threatened in writing with disciplinary suspensions without pay for work violations. We believe that these occurrences, coupled with the fact that Hahn does not claim that these deductions occurred under unusual circumstances, sufficiently demonstrate that Autoworks had an actual practice of suspending its managers without pay for disciplinary reasons. In sum, we conclude that the district court correctly concluded that Autoworks had a policy that created a significant likelihood of impermissible disciplinary

deductions in pay and that Autoworks had an actual practice of making such deductions.

**B. "Window of Correction" Defense**

Hahn also argues that the district court erred in concluding that it is not entitled to use the "window of correction" defense to "preserve" the exempt status of managers at Autoworks. We disagree.

The FLSA regulations define the "window of correction" defense as follows:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

29 C.F.R. § 541.118(a)(6). In *Auer*, the Supreme Court determined that the employer could invoke the "window of correction" defense by reimbursing the single employee

whose pay had been reduced through a disciplinary deduction. In so doing, the Supreme Court rejected the argument that reimbursement of lost wages under the "window of correction" must be made immediately upon the discovery of the improper deduction and further held that the "window of correction" could apply to instances in which deductions had been made inadvertently or "for reasons other than lack of work." *Auer*, 519 U.S. at 463. The Supreme Court, however, did not address the central question in this case, which is whether an employer may utilize the "window of correction" defense if it had a policy that created a significant likelihood of disciplinary pay deductions for salaried employees or had an actual practice of making more than a single such deduction.

The Secretary of Labor, in an amicus brief, provides some guidance to interpreting the "window of correction" defense, however, and as the Supreme Court has noted, where the regulation at issue is ambiguous, the Secretary's interpretation of such regulation is controlling "unless plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (citation omitted) (noting that courts should defer to reasonable and consistent interpretations of the FLSA regulations by the Secretary of Labor, even if they are provided in the form of a legal brief). *See also Christensen v. Harris County*, 529 U.S. 576, 588 (2000) ("[D]eference [to an agency's interpretation of its own regulation] is warranted only when the language of the regulation is ambiguous.").

In the amicus brief, the Secretary asserted that "an employer's objective *intention* to pay the employee on a

'salary basis' is determinative of whether an employer can use the 'window of correction.' " Amicus Br. at 18. The Secretary further explained that "[a]n employer that engages in a practice of making impermissible pay deductions, or has a policy that effectively communicates to its employees that such deductions will be made, necessarily has no intention of paying its employees on a 'salary basis,' and therefore has no recourse to the 'window of correction' for deductions made." Amicus Br. at 18-19; *see also id.* at 13 ("The 'window' should not be read to allow an employer to obtain the statutory overtime exemption where, as here, that employer has engaged in an actual practice of making impermissible deductions from pay pursuant to an established policy.").

Like the Seventh Circuit in *Whetsel v. Network Prop. Servs., LLC*, __ F.3d __, No. 00-2798, 2001 WL 322172 (7th Cir. Mar. 29, 2001), we believe that the "window of correction" regulation is ambiguous regarding whether it can be used to correct a policy or practice of making improper pay deductions. As the *Whetsel* court recognized, "the regulation does not explicitly state that it is available to correct a policy or pattern of deductions, thus leaving open the question of whether it applies to those circumstances." *Id.* at *3. In other words, while the "window of correction" regulation may be interpreted as allowing use of the defense in all cases except for those where there is a policy or practice of making pay deductions for claimed salaried employees due to lack of work, it may also be read as allowing use of the defense only when an employer does not have a policy or practice of making pay deductions "because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a).

Consequently, the Secretary's interpretation of the regulation is entitled to our deference, so long as it is reasonable.

We conclude that the Secretary's interpretation of the regulation, that the "window of correction" defense is not available to an employer who has a policy of making pay deductions from claimed salaried employees due to disciplinary infractions, is both reasonable and consistent with the FLSA regulations. Indeed, we agree that, when read in its entirety, the "window of correction" regulation allows use of the defense only after an employer has first demonstrated an intention to pay its employees on a salary basis. *See id.* at *4 ("Use of the word 'lost' suggests that an employer must first establish that it was entitled to the exemption, which requires *inter alia* that the employer demonstrate it was paying its employees on a salary basis."). We further agree with the Ninth Circuit that "[t]o interpret the rule otherwise would allow an employer to treat its employees as exempt for overtime purposes while, at the same time, intentionally failing to comply with the 'salary basis' rule." *Klem*, 208 F.3d at 1092. In essence, we believe that if employers could simply "use the window of correction to comply retroactively with the salaried-basis requirement," the "salary basis" test would be rendered "essentially meaningless." *Klem*, 208 F.3d at 1092; *see also Yourman v. Guiliani*, 229 F.3d 124, 128 (2d Cir. 2000), *cert. denied*, __ U.S. __, 2000 WL 118614 (U.S. Mar. 19, 2001) (No. 00-1235). Because we consider the "window of correction" regulation to be ambiguous and because we do not believe that the Secretary's interpretation of the regulation is clearly erroneous or inconsistent with the FLSA regulations, we defer to such interpretation.

Therefore, in light of our previous determination that Hahn had both a policy that created a significant likelihood of impermissible deductions and a practice of making such deductions, we conclude that the district court did not err in determining that Hahn failed to show that it was entitled to utilize the "window of correction" defense. In so doing, we reject Hahn's argument that this court should follow the decisions of other circuits, which have held that an employer may assert the "window of correction" defense by reimbursing improperly punished employees, who were penalized for reasons other than lack of work. *See, e.g., Paresi v. City of Portland*, 182 F.3d 665, 668 (9th Cir.), *cert. denied*, 528 U.S. 874 (1999); *Childers v. City of Eugene*, 120 F.3d 944, 947 (9th Cir. 1997); *Balgowan v. New Jersey*, 115 F.3d 214, 219 (3d Cir. 1997). Unlike this court, those courts reached their conclusions without the benefit of the Secretary's interpretation of the "window of correction" regulation and, moreover, had not concluded that the employers in their cases had policies permitting impermissible disciplinary deductions or actual practices of making such deductions. Therefore, we find those cases to be unpersuasive. *See Whetsel*, __ F.3d at __, No. 00-2798, 2001 WL 322172, at *4-6. Indeed, the three circuits that have addressed this issue with the benefit of the Secretary's interpretation have reached the same conclusion that we arrive at today. *See Whetsel*, __ F.3d at __, No. 00-2798, 2001 WL 322172, at *5-6; *Yourman*, 229 F.3d at 128; *Klem*, 208 F.3d at 1092. *See also Belcher v. Shoney's, Inc.*, 30 F. Supp. 2d 1010, 1022-24 (M.D. Tenn. 1998); *Hoffmann v. Sbarro, Inc.*, 982 F. Supp. 249, 257 (S.D.N.Y. 1997). In sum, we defer to the Secretary's interpretation of the "window of correction" regulation and, in so doing, hold that the district

court did not err in refusing to allow Hahn to utilize the "window of correction" defense. Were we to hold otherwise, the "window of correction" defense could regularly be used by employers to evade their responsibilities under the FLSA to establish policies and practices consistent with the substantive requirements for an exemption from overtime requirements for executives, administrators, and professionals compensated on a salary basis.

## III. CONCLUSION

In conclusion, we affirm the district court's decision that the managers were not exempt executive employees under the FLSA and that Hahn was not entitled to utilize the "window of correction" defense in this action. Therefore, we **AFFIRM** the district court's judgment in this case.

**APPENDIX B — DECISION AND ENTRY OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION DATED, DECIDED AND FILED APRIL 16, 1997**

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION

Case No. C-3-95-404

KENNETH A. TAKACS, et al.,

Plaintiffs,

vs.

HAHN AUTOMOTIVE CORPORATION,
dba Hahn Automotive Warehouse, Inc.,

Defendant.

April 16, 1997, Decided
April 16, 1997, Filed

* * *

JUDGES: WALTER HERBERT RICE, CHIEF JUDGE, UNITED STATES DISTRICT COURT.

OPINION BY: WALTER HERBERT RICE

*Appendix B*

DECISION AND ENTRY OVERRULING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (DOC. # 41); DECISION AND ENTRY SUSTAINING IN PART AND OVERRULING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (DOC. # 42); DEFENDANT GIVEN LEAVE TO FILE MOTION FOR SUMMARY JUDGMENT DIRECTED TOWARD ASSERTION THAT SPECIFIED REGULATION IS ARBITRARY AND CAPRICIOUS, BASED UPON STATEMENTS SET FORTH HEREIN, AND TOWARD WILLFULNESS OF ITS ALLEGED VIOLATIONS, WITHIN TWENTY (20) DAYS OF THE DATE OF THIS DECISION; CONFERENCE CALL SET TO DETERMINE NEW TRIAL DATE AND OTHER DATES LEADING TO THE RESOLUTION OF THIS LITIGATION

This suit involves a dispute as to whether Plaintiffs, a group of Store Managers and Senior Assistant Managers, were entitled to be paid overtime by their employer, Defendant Hahn Automotive Corporation, dba Hahn Automotive Warehouse, Inc. ("Hahn"), during their employment from approximately November 29, 1993, the date Defendant Hahn acquired the company, to approximately June 28, 1995. In an Amended Complaint (Doc. # 3), five named Plaintiffs[1] filed this suit pursuant to the Fair Labor Standards Act ("FLSA"), as codified at *29 U.S.C. § 201* et seq., alleging that their suit was a class

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1. These named Plaintiffs are: Kenneth A. Takacs, Andrew Evans, Lloyd K. Galloway, Kathy Griffith and Ursula F. Hooker (Doc. # 3).

action. Subsequently, twenty-two additional employees[2] filed written notices of consent to join this action as party plaintiffs, as required by *29 U.S.C. § 216(b)*. To date, however, this suit has not been certified as a class action by the Court, as no motion to certify has been filed by the named Plaintiffs.[3] Nevertheless, for ease of reference,

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2. These Plaintiffs, in order of their appearance in this lawsuit, are: Anita L. Newman; David H. Eley; Janet Flegel; Steven D. Brown; David S. Bradner; David Michael; Mark A. Flannery; Jerry S. Mathews; Aaron T. Price; Dennis M. Misik; Ernest E. Allen; Roger D. Kelly; Kevin W. Simmers; Frank T. Muscarella, Jr.; Arvil Nole, Jr.; Helen Webb; Jonathan Wood; Michael W. Timmerman; Leo P. Wince; James L. Teague; William Robert Underwood; and Clifford D. Johnson.

3. The Court would welcome such a motion, which should be made under *29 U.S.C. § 216(b)*, a provision that specifically applies to actions brought under the FLSA, rather than under the general class certification provision found in Fed. R. Civ. P. 23. See § 216(b) (providing that an action to recover wages under the FLSA "may be maintained . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated"); see also *Vanskike v. Peters, 974 F.2d 806, 812 (7th Cir. 1992)* ("The difference is that under § 216(b) the class member must opt in to be bound, while under Rule 23 the class member must opt out in order not to be bound").

Based upon its review of the affidavits, the Court would suggest a class consisting of the five named Plaintiffs and the twenty-two employees who have filed written notices of consent, both Store Managers and Senior Assistant Managers, who were similarly situated insofar as they were "employees who were not paid overtime but were subject to a policy of disciplinary suspensions without pay

(Cont'd)

the Court will refer to all twenty-seven employees as "Plaintiffs" throughout this opinion.

This Court has subject-matter jurisdiction over this action pursuant to *29 U.S.C. § 216(b)*, which provides that suit under the FLSA "may be maintained against any employer . . . in any Federal or State court of competent jurisdiction." In addition, the Court has federal question jurisdiction over this action pursuant to *28 U.S.C. § 1331*.

Currently pending before this Court are the following motions: Defendant's Motion for Summary Judgment (Doc. # 41)[4] and Plaintiffs' Motion for Partial Summary Judgment (Doc. # 42).[5] After setting forth the proper standard

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(Cont'd)
which lasted for less than a week." Importantly, Plaintiffs should file, with their motion, properly signed and notarized affidavits for the foilowing employees: Janet Flegel (no affidavit submitted); Ursula Hooker (unsigned affidavit submitted); William Robert Underwood (unsigned affidavit submitted); Helen Webb (no affidavit submitted); Leo Wince (no affidavit submitted); and Jonathan Wood (unsigned affidavit submitted).

4. Although there are currently only five Plaintiffs — due to the lack of class certification — Defendant apparently has requested summary judgment on the Plaintiffs' overtime claim against all twenty-seven employees who have opted to be plaintiffs in this action (Doc. # 41 at 2).

5. It appears, from the concluding statement in this Motion, that Plaintiffs have requested summary judgment on the issues of the Defendant's liability for failure to pay overtime and its (Cont'd)

to be applied when ruling upon motions for summary judgment, the Court will turn to these Motions. Specifically, the Court will separately address arguments made in regard to all of the Plaintiffs, both Store Managers and Senior Assistant Managers (i.e. "salary" test), and arguments made only in regard to those Plaintiffs who are Senior Assistant Managers (i.e. "duties" test).

I. Standard for Summary Judgment Motions

Before focusing on the merits of the motions, the Court will set forth the relative burdens of the parties once a motion for summary judgment is made. Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).*

> Of course, [the moving party] always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

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willfulness in violating the FLSA, but have requested further proceedings to determine damages. Thus, Plaintiffs have moved for summary judgment on the issues of liability and willfulness, but not damages.

*Id. at 323*. See also *Boretti v. Wiscomb, 930 F.2d 1150, 1156 (6th Cir. 1991)* (The moving party has the "burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record, construed favorably to the non-moving party, do not raise a genuine issue of material fact for trial." quoting *Gutierrez v. Lynch, 826 F.2d 1534, 1536* [6th Cir. 1987]). The burden then shifts to the non-moving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)* (quoting Fed.R.Civ.P. 56(e)). Thus, "[o]nce the moving party has met its initial burden, the nonmoving party must present evidence that creates a genuine issue of material fact making it necessary to resolve the difference at trial." *Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1245 (6th Cir. 1995)*. Read together, Liberty Lobby and Celotex stand for the proposition that a party may move for summary judgment by demonstrating that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict motion (now known as a motion for judgment as a matter of law. Fed.R.Civ.P. 50). *Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989)*.

Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient to "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. Rather, Rule 56(e) "requires the non-moving party to go beyond the [unverified] pleadings" and present

some type of evidentiary material in support of its position. *Celotex Corp., 477 U.S. at 324*. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Summary judgment shall be denied "[i]f there are . . . 'genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.' " *Hancock v. Dodson, 958 F.2d 1367, 1374 (6th Cir. 1992)*. Of course, in determining whether a genuine issue of material fact exists, a court must assume as true the evidence of the nonmoving party and draw all reasonable inferences in the favor of that party. *Anderson, 477 U.S. at 255* (emphasis added). If the parties present conflicting evidence, a court may not decide which evidence to believe, by determining which parties' affiants are more credible; rather, credibility determinations must be left to the fact-finder. 10A Wright, Miller & Kane, Federal Practice and Procedure, § 2726. In ruling on a motion for summary judgment (in other words, in determining whether there is a genuine issue of material fact), "[a] district court is not . . . obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *Interroyal Corp. v. Sponseller, 889 F.2d 108, 111 (6th Cir. 1989)*, cert. denied, *494 U.S. 1091 (1990)*. See also, *L.S. Heath & Son, Inc. v. AT&T Information Systems, Inc., 9 F.3d 561, 1993 U.S. App. LEXIS 26670* (7th Cir. October 12, 1993); *Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 915 n. 7* (5th Cir.), cert. denied, *506 U.S. 832, 113 S. Ct. 98, 121 L. Ed. 2d 59 (1992)* ("Rule 56 does not impose upon the district court a duty to sift

through the record in search of evidence to support a party's opposition to summary judgment . . . ."). Thus, a court is entitled to rely, in determining whether a genuine issue of material fact exists on a particular issue, only upon those portions of the verified pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits submitted, specifically called to its attention by the parties.

II. Synopsis of Generally Applicable Law

Before turning to the specific arguments advanced by the parties, the Court will set forth a brief synopsis of the pertinent law.

The Fair Labor Standards Act ("FLSA") was enacted in 1938 for the purpose of eliminating "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." *29 U.S.C. § 202(a)*. To this end, the FLSA requires employers to compensate any employee not covered by a specific exemption for hours worked in excess of forty hours a week, "at a rate not less than one and one-half times the regular rate at which he is employed." *29 U.S.C. § 207(a)*. Given the Act's broad and remedial purpose, exemptions to the overtime requirement of the FLSA "are to be narrowly construed against employers." *Salyer v. Ohio Bureau of Workers' Compensation, 83 F.3d 784, 786 (6th Cir. 1996)*.

One statutory exemption to the FLSA's overtime provision applies to "any employee employed in a bona fide executive, administrative, or professional capacity." *29 U.S.C. § 213(a)(1)* (emphasis added). In this lawsuit,

*Appendix B*

Defendant argues that the Plaintiffs — who were not paid overtime even though they regularly worked more than forty hours per week (see Affidavits attached to Docs. # 42) — were "executive" employees within the meaning of this definition, and thus were exempt from the overtime provisions of the FLSA. The issue before this Court, therefore, is whether the Plaintiffs were executive employees and so were exempt from the FLSA at the relevant times during their employment with the Defendant.

The Secretary of Labor has defined the term "employee employed in a bona fide executive capacity" by setting forth two tests which apply to separate groups of employees. The "long" test is made up of several factors, and must be met by an employee who makes at least $155 per week but not more than $250 per week. The "short" test, which is argued by the Defendant to be applicable to this case (Doc. # 47 at 10),[6] reads as follows:

> [A]n employee who is compensated on a salary basis at a rate of not less than $250 per week . . . and whose primary duty consists of the management of the enterprise in which the employee is employed

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6. Plaintiffs have not contested this argument, supported by testimony from the Defendant's former Regional Manager that the senior assistant managers made more than $250.00 per week (Affidavit of Fred Coe, attached to Doc. # 47), but have merely argued that, even assuming that the "short test" is applicable, the Plaintiffs should prevail (Doc. # 51 at 2). Since the Plaintiffs are, as will be seen, correct in their argument that they should prevail under the short test, the Court will accept, for purposes of this opinion, the Defendant's contention that this test is applicable to this case.

> or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

*29 C.F.R. § 541.1(f)*. Thus, under this "short" test, an employee must be compensated on a salary basis ("salary test") and perform specific duties ("duties test") in order to be considered to be exempt from the overtime requirement of the FLSA. In other words, if either of the foregoing tests is not met, then the employee will not be exempt.

III. Arguments Relating to All Plaintiffs: "Salary" Test

As noted above, under the "short" test, an executive employee must be compensated "on a salary basis" in order to be exempt from the FLSA. In regard to the putative class of Plaintiffs as a whole, that is, both Store Managers and Senior Assistant Managers, Plaintiffs argue that they were not exempt because they were not compensated on a "salary basis."

Specifically, Plaintiffs point to the existence of a disciplinary policy which was in effect until June 28, 1995, that allowed both Store Managers and Senior Assistant Managers "to be suspended without pay [for periods of less than a week] for disciplinary reasons." (Beckerman Affidavit, attached to Doc. # 41, ¶ 2). Several of the Defendant's employees, including three of the Plaintiffs,[7] were suspended

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7. Store Manager David Michael was suspended for three days in April, 1995, because he had allowed an employee take an item

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for periods of less than a week from the date Defendant Hahn acquired the company, November 29, 1993, until the date the policy was revoked, on June 28, 1995.

Plaintiffs argue that this policy, which allowed salaried employees to be suspended without pay for periods of less than a week for disciplinary reasons, contravened the following applicable FLSA regulation:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

*29 C.F.R. § 541.118(a)* (emphasis added). Due to the existence of the policy, Plaintiffs argue that their pay was "subject to reduction" and that they therefore were not paid "on a salary basis," were not executive employees within the meaning of the FLSA exemption, and were, therefore, entitled to overtime.

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that was unsalable (Michael Affidavit, attached to Doc. # 42, ¶ 4). Store Manager Kenneth Takacs was suspended for two days in March, 1994, for failing to keep the store safe locked (Takacs Affidavit, attached to Doc. # 42, ¶ 4). Finally, Store Manager Frank Muscarella, Jr., was suspended for a period of for three days in February, 1994, for failing to make a bank deposit properly (Muscarella Affidavit, attached to Doc. # 43, ¶ 5).

*Appendix B*

Although there are several enumerated exemptions to this regulation, the parties do not dispute that only one exemption allows employees to be suspended without pay for disciplinary reasons, and, further, that this exemption is limited to "infractions of safety rules of major significance." *29 C.F.R. § 541.118(a)(5)*. Notably, Defendant has not argued that its policy was limited in its form or application to infractions of safety rules of major significance, and that this particular exemption, therefore, applies to the Plaintiffs.

Instead, Defendant has relied upon the so-called "window of correction" provision, which is part of the regulation that defines "on a salary basis," to argue that the Plaintiffs were exempt from the FLSA. This provision reads as follows:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

*29 C.F.R. § 541.118(a)(6)*. In this case, it is undisputed that the Defendant did reimburse (or attempt to reimburse) all of the employees who had been suspended for less than a week.[8] Moreover, it is undisputed that the Defendant revoked its policy in June, 1995, thereby indicating its intent to comply with *29 C.F.R. § 541.118(a)* in the future.[9] Furthermore, there is no evidence in the record which suggests that the Defendant has not so complied with this same regulation since that date.

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8. On October 12, 1995, Defendant reimbursed six employees who had been suspended under this disciplinary policy, including Plaintiff David Michael, who had been suspended approximately six months earlier, and Plaintiff Frank Muscarella, Jr., who had been suspended approximately twenty months earlier (Doc. # 42, Plaintiff's Exh. 33-38). Defendant Hahn attempted to reimburse Plaintiff Takacs on August 19, 1996 (Takacs Affidavit, attached to Doc. # 42, ¶ 5), approximately twenty-nine months after he had been suspended, and ten months after this lawsuit was filed. Although Plaintiffs argue that the Defendant failed to reimburse its employees in a timely fashion, sufficient to invoke the protection of the window of correction provision, the Court need not reach this issue, given its disposition of the issues herein. It does, however, note that there is no specific language in § 541.118(a)(6) which indicates that reimbursement must be made within a particular period of time. See *Auer v. Robbins, 519 U.S. 452, 117 S. Ct. 905, 912, 137 L. Ed. 2d 79 (1997)* (noting that the language of this regulation "does not address the timing of reimbursement, and the Secretary's amicus brief informs us that he does not interpret it to require immediate payment").

9. Plaintiffs argue that, in addition to promising to comply with the FLSA in the future, the Defendant was required to notify its employees of its intent to do so. The Court does not, because it need not, reach the merits of this argument, given its disposition of the issues herein.

*Appendix B*

At this juncture, therefore, there are two issues before this Court: first, as argued by the Plaintiffs, whether their pay was "subject to reduction" such that they were not paid on a salary basis, and second, as argued by the Defendant, whether its compliance with the "window of correction" provision sufficed to preserve the exempt status of these employees. The Court will address each of these issues in turn.

1. Whether Plaintiffs were paid on a salary basis

The first issue before this Court is whether Plaintiffs were or were not paid "on a salary basis" from November 29, 1993, until June 28, 1995, given the undisputed existence of a disciplinary policy which allowed them to be suspended without pay for periods of less than one week. Although there is no dispute as to the existence of the policy, the pertinent issue before the Court is whether only those Plaintiffs whose compensation was actually reduced under this policy were not paid "on a salary basis"; or, more broadly, whether any employee who could have had their pay reduced under the policy was not paid "on a salary basis."

The Supreme Court recently handed down a decision, *Auer v. Robbins, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997)*, which is directly on point. The petitioners in Auer were St. Louis police sergeants and a lieutenant who had sued their Police Commissioners for overtime pay under the FLSA, claiming that they were not exempt employees, and thus were eligible for overtime, because the Police Department Manual allowed their pay to be reduced for various disciplinary infractions. Importantly, the Police

Department did not implement this policy as a general practice; indeed, the record indicated that only one sergeant had ever been subject to a reduction in pay for disciplinary reasons, and that was an unusual circumstance given that he had accepted the reduction in lieu of termination.

In its unanimous opinion, the Supreme Court held that petitioners met the "salary-basis" test and therefore were exempt employees, not entitled to overtime pay. As its rationale, the Court accepted the interpretation of the "salary basis" regulation proffered by the Secretary of Labor in the Brief for the United States as Amicus Curiae supporting affirmance, *1996 WL 595843* (Oct. 11, 1996), which was summarized as follows:

> The Secretary of Labor . . . interprets the salary-basis test to deny exempt status when employees are covered by a policy that permits disciplinary or other deductions in pay "as a practical matter." That standard is met, the Secretary says, if there is either an actual practice of making such deductions or an employment policy that creates a "significant likelihood" of such deductions. The Secretary's approach rejects a wooden requirement of actual deductions, but in their absence it requires a clear and particularized policy — one which "effectively communicates" that deductions will be made in specified circumstances.

*117 S. Ct. at 911*. The Court concluded that the policy at issue in Auer did not create a "significant likelihood of

disciplinary deductions" from the plaintiffs' pay, given that all department employees were nominally covered by the policy — including those who are clearly non-exempt — and the manual did not, therefore, "effectively communicate" that "pay deductions are an anticipated form of punishment for employees in petitioner's category," since the policy may have been intended to apply only to those employees who are obviously non-exempt. Id. (emphasis in original). "Nor, under the Secretary's approach, is such a likelihood established by the one-time deduction in a sergeant's pay, under unusual circumstances." Id. at 912. Accordingly, since there was neither an "actual practice" nor a "significant, likelihood" of imposing pay reductions for disciplinary reasons upon employees in the petitioner's category, the Court concluded that the petitioners were exempt employees.

Applying this standard to the factual circumstances presented by this case, and in light of the mandate that this Court narrowly construe the exemptions to the FLSA against the employer, *Salyer, 83 F.3d at 786*, this Court concludes that there was both an "actual practice" of reducing the Plaintiffs' pay for disciplinary reasons, as demonstrated by affidavits from three Plaintiffs whose pay was reduced under the policy,[10] and a significant likelihood that the policy would be implemented by the Defendant, as evidenced by its implementation on at least three occasions, which "effectively communicated" to the Plaintiffs that their pay might be reduced under the policy. Therefore, this Court

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10. As noted, supra, this Court is using the term "Plaintiffs" to refer not only to the five named Plaintiffs but also to the twenty-two employees who have filed written notices of consent to join this action.

holds that, under the Defendant's former disciplinary policy, all of the Plaintiffs were "covered by a policy that permit[ted] disciplinary or other deductions in pay 'as a practical matter' " and were not paid "on a salary basis" from November 29, 1993 to June 28, 1995. Accordingly, the Plaintiffs were not "salaried employees" during that period of time and were not exempt from the overtime requirements of the FLSA.[11]

2. Effect of the "Window of Correction" provision

Next, the Court will turn to the Defendant's argument that the "window of correction" provision, *29 C.F.R. § 541.118(a)(6)*, had the effect of preserving the Plaintiffs' status as exempt employees.

The difficulty with this argument is immediately apparent from its phrasing. The applicable regulation provides that where certain improper deductions have been made, "the exemption will not be considered to have been lost" if the employer takes certain actions. *29 C.F.R. § 541.118(a)(6)*. By its terms, therefore, the window of correction provision applies only to exempt employees. See *Auer, 117 S. Ct. at 912* (holding that in regard to the sergeant whose pay was improperly reduced, respondents were "entitled to preserve [his] exempt status by complying with the corrective provision in § 541.118(a)(6)").

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11. As noted earlier, supra at 8, because the Court has concluded that the Plaintiffs were not paid on a salary basis, the Court need not examine the "duties" test before concluding that the Plaintiffs were not exempt employees.

However, this Court has already held that the Plaintiffs were not paid on a salary basis during the relevant time period, and thus were not exempt employees. Therefore, because the Plaintiffs were not exempt, the Defendant could not have "preserved" their non-existent status as exempt employees by invoking the protection of the window of correction provision. See *Martin v. W.E. Monks & Co., 1993 U.S. App. LEXIS 20610, No. 92-3739, 1993 WL 300332*, at *4 (6th Cir. 1993) ("Since the employees at issue in this case were not paid as salaried employees, § 541.118(a)(6) is not available to the defendants"); *Dole v. Walker and Armstrong, 763 F. Supp. 1052, 1054 (D. Ariz. 1990)* ("Because defendants' employees are not paid on a salary basis and thus not exempt under the Fair Labor Standards Act, there is no preservable exempt status under § 541.118(a)(6)"). Therefore, Defendant's reliance upon the window of correction provision set forth in *29 C.F.R. § 541.118(a)(6)* is unavailing.[12]

3. Validity of *29 C.F.R. § 541.118(a)*

Having determined that the Plaintiffs were not exempt from the FLSA during their employment with the Defendant from November 29, 1993; to June 28, 1995, there would appear to be little left to do but to enter summary judgment for the Plaintiffs, conditioned upon the certification of this

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12. Given this conclusion, this Court does not, because it need not, reach the argument raised by the Plaintiffs as to whether the phrase "where a deduction not permitted . . . is inadvertent, or is made for reasons other than lack of work," as utilized in *29 C.F.R. § 541.118(a)(6)*, should be interpreted in a conjunctive (requiring inadvertence) or disjunctive manner. (See Doc. # 48 at 6-7).

lawsuit as a class action. Defendant, however, has raised a challenge to the validity of the regulation which defines "on a salary basis," *29 C.F.R. § 541.118(a)*, by arguing that it is arbitrary and capricious pursuant to the Administrative Procedure Act ("APA"), as codified at *5 U.S.C. § 706(2)(A)*, and is therefore invalid. Defendant further argues that because this regulation is invalid, it cannot be relied upon by the Plaintiffs to establish that they are non-exempt employees.

Unfortunately, this challenge to the validity of the regulation cannot be considered at this time, given the Defendant's failure either to include the Department of Labor ("DOL") in this lawsuit, or to provide the Court with a full rulemaking record from which the DOL's rationale for authoring the regulation can be clearly gleaned. The law is clear that when reviewing the validity of a regulation under the narrow "arbitrary and capricious" standard, the Court must consider the agency's rationale for its regulation rather than conjuring up a likely or reasonable rationale which would sustain the regulation:

> [The agency] argues that under the [arbitrary and capricious] standard, a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute. We do not disagree with this formulation. The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must

> examine the relevant data and articulate a satisfactory explanation for its action. . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.

*Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983)* (emphasis added) (citations omitted).[13] Here, although the Court must examine the agency's rationale in order to rule upon the Defendant's argument, the record before this Court contains neither an explanation from the agency, itself, as to its rationale for

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13. Although Plaintiffs rely upon the analysis set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)*, which inquired only whether "the agency's [interpretation of a statute] is based on a permissible construction of the statute" and did not require an examination of the agency's actual rationale, that case did not involve an application of the narrower "arbitrary and capricious" standard which is relied upon by the Defendant in this case. Accordingly, the analysis in Chevron is not controlling here.

enacting the challenged regulation, nor a comprehensive rulemaking record from which the agency's "reasoned basis" could be accurately detected.

Accordingly, this Court will not, because it cannot, sustain the Defendant's Motion for Summary Judgment on this issue at this time. Instead, it will give the Defendant leave to file a motion for summary judgment targeted toward this issue, which should include and discuss as much of the applicable rulemaking record that can be obtained. In this regard, Defendant may wish to refer to the United States Amicus Brief filed in Auer, which can be found at *1996 WL 595843*. Defendant may also wish to address the issue of whether the United States Department of Labor is a party which should be joined under Rule 19 of the Federal Rules of Civil Procedure.

Therefore, in regard to the validity of *29 C.F.R. § 541.118(a)*, the Defendant's Motion for Summary Judgment (Doc. # 41) is OVERRULED.

IV. Arguments Relating to Senior Assistant Managers Only: "Duties" Test

In addition to the arguments discussed above, which applied to both Store Managers and Senior Assistant Managers, the Plaintiffs have further asserted that the Senior Assistant Managers were non-exempt employees (and thus are entitled to overtime) because they did not meet the "duties test" set forth in *29 C.F.R. § 541.1(f)*, quoted above.

The Court declines to reach this argument at this time, as it will become unnecessary to reach this issue if this Court

holds, ultimately, that the challenged regulation, *29 C.F.R. § 541.118(a)*, is valid and that all of the Plaintiffs, including the Senior Assistant Managers, are therefore entitled to overtime pay because they were not salaried employees. Accordingly, the Court will defer ruling upon this issue. However, it will note that if it does ultimately reach this issue, the Plaintiffs may well have to persuade the Court that these Senior Assistant Managers are "similarly situated" to each other in regard to their duties, and should therefore be certified as a sub-class pursuant to *29 U.S.C. § 216(b)*, in addition to making arguments regarding the duties test.

Accordingly, in regard to the issue of whether the Plaintiffs who were Senior Assistant Managers met the "duties test" set forth in *29 C.F.R. § 541.1(f)*, the Defendant's Motion for Summary Judgment (Doc. # 41) is OVERRULED. The Plaintiffs' Motion for Partial Summary Judgment (Doc. # 42) is also OVERRULED.

IV. Willfulness of the Violations

Assuming arguendo that this Court will ultimately rule that § 541.118(a) is valid, and in the interest of allowing the Defendant to calculate its potential liability in this case were this Court to enter judgment for the Plaintiffs, the Court will now reach the issue of whether the Defendant's alleged violations of the FLSA were "willful."

The FLSA provides a two-year statute of limitations for violations thereof, unless the violation was "willful," in which event a three-year statute of limitations applies. *29 U.S.C. § 255(a)*. Although this lawsuit was filed less than

two years after Defendant Hahn acquired the company and, therefore, became liable for any failure to comply with the FLSA, the Plaintiffs have explained that this issue is, nonetheless, relevant because the statute of limitations is not tolled in regard to a particular employee until he or she files a written consent to become a party Plaintiff in the lawsuit. *29 U.S.C. § 256(b)*. In this case, all of the Plaintiffs except the five named Plaintiffs filed their Notices of consent to join this action after November 29, 1995, which is exactly two years after the date upon which Defendant Hahn acquired the company. Therefore, a two-year statute of limitations would bar either some or all of these Plaintiffs' damages, depending upon their particular circumstances. The application of a three-year statute of limitations, however, would allow them to recover their damages in full.

The standard for determining whether a violation of the FLSA was willful was set forth by the Supreme Court in *McLaughlin v. Richland Shoe Co., 486 U.S. 128, 132-33, 100 L. Ed. 2d 115, 108 S. Ct. 1677 (1988)* (citing *Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 83 L. Ed. 2d 523, 105 S. Ct. 613 (1985))*. In that case, the Supreme Court rejected a standard of willfulness which had been applied whenever an employer merely knew that the FLSA might be applicable. Instead, the Court noted that the term "willful" is synonymous with the terms "voluntary," "deliberate" and "intentional," and that its legal meaning is "generally understood to refer to conduct that is not merely negligent." Therefore, the Court adopted a standard of willfulness which had been set forth in Thurston, requiring "that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." Id. (emphasis added).

The Sixth Circuit applied this standard in the case of *Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962, 966-67 (6th Cir. 1991)*. Finding that the defendant "had actual notice of the requirements of the FLSA by virtue of earlier violations [of that Act], his agreement to pay unpaid overtime wages, and his assurance of future compliance with the FLSA," the Sixth Circuit held that its alleged violation of the FLSA was "willful." Id. Notably, the Sixth circuit found it to be "significant" that the defendant failed to dispute the existence of earlier violations of the FLSA by its previous business. Id. Although the Plaintiffs have interpreted this case as holding that "actual notice of the requirements of the FLSA may be sufficient to find a willful violation," (Doc. # 51, p.8), this reading is overbroad, particularly in view of the Supreme Court's express rejection of an interpretation which would make a violation willful where the employer was merely aware of the FLSA's requirements. *Richland Shoe Co., 486 U.S. at 133*. Instead, there must be evidence sufficient to create a genuine issue of material fact as to whether the Defendant "knew or showed reckless disregard" as to its violation of the FLSA.

Bearing this interpretation of the "willfulness" standard in mind, the Court turns to the facts set forth by parties in regard to this issue, construed in the manner most favorably to the Plaintiffs. The Defendant's Vice President and Corporate Counsel, David Beckerman, has testified that he did not become aware of the existence of the policy (which had been carried over from the predecessor company, Northern Automotive) until May, 1995, as a result of a lawsuit filed against Northern Automotive for violating the FLSA (Beckerman Affidavit, attached to Doc. # 41, ¶ 2).

*Appendix B*

Upon learning of this lawsuit, the Defendant investigated whether it had the same disciplinary policy, discovered that it did; revoked the policy, and reimbursed the employees who had been suspended without pay under that policy (Id. at ¶¶ 3-6).

In their Motion (Doc. # 42), the Plaintiffs have speculated that because the Defendant's predecessor company, Northern Automotive, was sued for violating this very same provision in November, 1994, Defendant must have been on notice since that date that it may have been violating the FLSA with regard to its overtime requirement. However, Plaintiffs have provided no direct evidence of this assertion, nor have they provided any evidence sufficient to create a genuine issue of material fact as to whether the Defendant knew, prior to May, 1995, that it may have been violating the overtime requirement of the FLSA. In addition, the Defendant's undisputed testimony indicates that it immediately took action to correct the situation and comply with the FLSA.

Based upon this undisputed evidence, and the Plaintiffs' failure to adduce any evidence indicating that the Defendant either knew that it was violating the FLSA or showed reckless disregard (by virtue of previous violations) as to the same, this Court concludes that the Plaintiffs have failed to establish, as a matter of law, that the Defendant's alleged violations of the FLSA were "willful." Therefore, the Plaintiff's Motion for Summary Judgment must be overruled on this point.

The Court observes here that although there would certainly appear to be a lack of a genuine issue of material

fact as to the willfulness of the Defendant's alleged violations of the FLSA, the Court cannot conclude, at this time, that these alleged violations were not willful, as a matter of law — and, therefore, that a two-year statute of limitations applies to this action — for the sole reason that the Defendant has not moved for summary judgment on this issue. The Court will, however, allow the Defendant to raise this issue in its future motion for summary judgment which addresses its contention that the challenged regulation is arbitrary and capricious.

WHEREFORE, based upon the aforesaid, the Defendant's Motion for Summary Judgment (Doc. # 41) is OVERRULED.

The Plaintiffs' Motion for Partial Summary Judgment (Doc. # 42) is SUSTAINED in part and OVERRULED in part. Specifically, said Motion is SUSTAINED in regard to the exempt or non-exempt status of the Plaintiffs under the "salary" test of the FLSA, as this Court has held that they are not exempt. Said Motion is OVERRULED in regard to the following issues: the validity of § 541.118(a); whether the Plaintiffs who are Senior Assistant Managers are exempt under the "duties" test; and the alleged willfulness of the Defendant in violating the FLSA.

Defendant is given leave to file a motion for summary judgment directed toward its assertion that *29 U.S.C. § 541.118(a)* is arbitrary and capricious, guided by this Court's statements herein, and toward the willfulness of its alleged violations of the FLSA, within twenty (20) days of the date of this decision.

*Appendix B*

A conference call will be held between Court and Counsel on Thursday, May 1, at 5:00 p.m., for the purpose of setting a new trial date and other dates leading to the resolution of this litigation.

April 16, 1997

WALTER HERBERT RICE,
CHIEF JUDGE
UNITED STATES DISTRICT
COURT

# APPENDIX C — STATUTORY AND REGULATORY PROVISIONS

## 29 U.S.C. § 213(a)(1)

**§ 213. Exemptions**

**(a) Minimum wage and maximum hour requirements.** The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 [29 USCS §§ 206, 207] shall not apply with respect to —

> (1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act . . .) . . . .

* * *

## 29 C.F.R. § 541.1(a) and (f)

**§ 541.1 Executive.**

The term "employee employed in a bona fide executive * * * capacity" in section 13(a)(1) of the Act shall mean any employee:

*Appendix C*

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and

* * *

(f) Who is compensated for his services on a salary basis . . . .

* * *

**29 C.F.R. § 541.2(a)(1) and (e)(1)**

**§ 541.2 Administrative.**

The term employee employed in a bona fide * * * administrative * * * capacity in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of either:

(1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or

* * *

(e)(1) Who is compensated for his services on a salary or fee basis . . . .

* * *

*Appendix C*

**29 C.F.R. § 541.3(a)(1) and (e)**

**§ 541.3 Professional.**

The term employee employed in a bona fide * * * professional capacity in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of the performance of:

> (1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

* * *

(e) Who is compensated for services on a salary or fee basis . . . .

* * *

**29 C.F.R. § 541.118(a)(1)-(6)**

**§ 541.118 Salary basis.**

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his

employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

(1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide

plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. . . .

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these

interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

* * * *

**APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION IN *JOHNSON, etc. v. CHICAGO HOUSING AUTHORITY, et al.* DATED, DECIDED AND ENTERED NOVEMBER 19, 1997 AND DOCKETED NOVEMBER 24, 1997**

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 94 C 7692, 97 C 3584

ROYCE JOHNSON, individually and on behalf of
a class of persons similarly situated,

Plaintiffs,

v.

CHICAGO HOUSING AUTHORITY, VINCENT LANE,
individually, and GEORGE MURRAY, individually,

Defendants,

WARREN AVERY, et al.,

Plaintiffs,

v.

CHICAGO HOUSING AUTHORITY,

Defendant.

*Appendix D*

November 19, 1997, Decided
November 24, 1997, Docketed

* * *

JUDGES: Paul E. Plunkett, UNITED STATES DISTRICT JUDGE.

OPINION BY: Paul E. Plunkett

MEMORANDUM OPINION AND ORDER

Plaintiffs have sued defendants (collectively "CHA") for alleged violations of the Fair Labor Standards Act ("FLSA"), *29 U.S.C. § 201* et seq. (1996), the Illinois Minimum Wage Act, 820 Ill. Comp. Stat. 105/1-105/15 (West 1997) and the Illinois Wage Payment and Collection Act, 820 Ill. Comp. Stat. 115/1-115/16 (West 1997). The case is before the Court on plaintiffs' Fed. R. Civ. P. 56(c) motion for partial summary judgment on the FLSA and Illinois Minimum Wage Act claims. For the reasons set forth below, plaintiffs' motion is denied.

The Legal Standard

Federal Rule of Civil Procedure 56(c) permits summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." At this stage, the Court does not weigh evidence or determine the truth of the matters

asserted. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).* All facts must be viewed and all reasonable inferences drawn in the light most favorable to the non-moving party. *Karazanos v. Navistar Int'l Transp., Corp., 948 F.2d 332, 335 (7th Cir. 1991)* (citing *Lohorn v. Michal, 913 F.2d 327, 331 (7th Cir. 1990)).* "Summary judgment is only appropriate when the record reveals that no reasonable jury could find for the non-moving party." Id. (citing *Doe v. Allied-Signal, Inc., 925 F.2d 1007, 1008 (7th Cir. 1991)).*

Background

Plaintiffs are current or former sergeants, lieutenants and captains in CHA's Police Department. (Pls.' Local Rule 12(m) Statement at ¶ 1.) CHA has assigned each plaintiff a salary. (Defs.' Local Rule 12(n) Statement at ¶ 13.) These salaries are reflected on CHA's Manager's Personnel Action Request (M-PAR) forms. (Id. at ¶ 26.) Salary increases, merit bonuses, promotions, demotions and similar actions impacting compensation are recorded on the M-PAR forms. (Id. at ¶ 26.) On average, the salaries assigned to plaintiffs exceed $56,000 annually. (Id. at ¶ 15.)

Despite the salary assignments, CHA requires plaintiffs to keep a record of the hours they work. (Pls.' Local Rule 12(m) Statement at ¶ 11.) Moreover, if plaintiffs work more than forty hours in any week, CHA pays them overtime. (Id. at ¶ 22.) Currently, overtime consists of compensatory time or wages at one and one-half times plaintiffs' regular hourly rates. (Id. at ¶ 26.)

*Appendix D*

CHA uses the same payroll system to pay plaintiffs as it does to pay employees it admits are covered by FLSA. (Id. at ¶ 17.) Plaintiffs are required to record the hours they work on Attendance & Assignment ("A&A") sheets. (Id. at ¶ 12.) Subsequently, the information on the A&A sheets is transferred onto time cards and sent to CHA's payroll department. (Id. at ¶¶ 13, 14, 15.) Presumably, the payroll department then issues paychecks to plaintiffs.

Over the last five years, CHA suspended various plaintiffs, without pay, for minor rule violations. (Id. at ¶ 32.) These suspensions were ordered pursuant to CHA policy. (Id. at ¶ 50.) Over the same time period, CHA also docked various plaintiffs' pay for temporary military leave. (Id. at ¶ 52.) These pay reductions were also taken pursuant to CHA policy. (Id.)

On August 8, 1997, CHA's Board of Directors approved Resolution No. 97-CHA- 168. (Defs.' Local Rule 12(n) Statement at ¶ 1.) In relevant part, the Resolution provides:

> [N]o CHA Police Officer holding the rank of sergeant or above may be suspended without pay or have any deduction made in his or her pay, including any deduction of compensatory time, for a period of less than one full workweek. In addition, no deduction may be made from the salary of any CHA Police Officer holding the rank of sergeant or above for absences of less than one full workweek occasioned by jury duty, military leave, or testifying as a witness. Further, the CHA will not deduct pay or compensatory, sick or

> vacation accruals for partial day absences for Officers holding the rank of sergeant or above. . . . [I]t is the policy of the CHA to adhere to and follow the requirements of the Fair Labor Standards Act, the Illinois Minimum Wage Act and the Illinois Wage Payment and Collection Act.

(Id. at ¶ 2.) After this Resolution was adopted, however, a number of plaintiffs were either suspended for minor rule infractions or were forced to use benefit time or take unpaid leave for temporary military leave. (Pls.' Resp. to Defs.' Local Rule 12(n) Statement at ¶ 1.)

Discussion

Plaintiffs claim that they are hourly employees of the CHA covered by the overtime provisions of FLSA. CHA contends that plaintiffs are exempt from FLSA and that it is entitled to use the "window of corrections" to preserve their exempt status. As discussed below, CHA is entitled to use the window of corrections, but genuine issues of material fact remain as to CHA's compliance with that statutory provision.

FLSA requires employers to pay employees time and one-half for each hour over forty they work in any one workweek. *29 U.S.C. § 207(1)(1)*. That requirement does not, however, apply to "any employee employed in a bona fide executive, administrative, or professional capacity." *29 U.S.C. § 213(a)(1)*. CHA bears the burden of proving that plaintiffs qualify for one or more of these exemptions.

*Appendix D*

*Corning Glass Works v. Brennan, 417 U.S. 188, 196-97, 94 S. Ct. 2223, 41 L. Ed. 2d 1 (1974).*

The Department of Labor has promulgated regulations defining and explaining the exemptions. The regulations divide each exemption into a "duties component" (*29 C.F.R. §§ 541.1(a-e), 541.2(a-d), 541.3(a-d)*) and a "salary component" (*29 C.F.R. §§ 541.1(f), 541.2(e), 541.3(e)*). *Bankston v. State of Illinois, 60 F.3d 1249, 1252-53 (7th Cir. 1995)*. Though the duty components vary, to satisfy the salary component of each exemption an employee must be paid on a "salary basis." See *29 C.F.R. §§ 541.1(f), 541.2(e), 541.3(e)*.

An employee is paid on a salary basis if he regularly receives "a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." *29 C.F.R. § 541.118(a)*. Salaried employees "must receive [their] full salary for any week in which [they] perform[ ] any work," regardless of the number of days or hours actually worked. Id. Moreover, employers may not deduct pay from salaried employees for absences due to temporary military duty or for infractions of minor rules. *29 C.F.R. §§ 541.118(a)(4), (5)*. The effect of a prohibited deduction "will depend upon the facts in a particular case." *29 C.F.R. § 541.118(a)(6)*. If a deduction "is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." Id. This remedial provision is commonly called the "window of correction."

*Appendix D*

There is no dispute that CHA made deductions from certain plaintiffs' salaries for infractions of minor rules and for temporary military leave. Defendants contend, however, that those deductions do not destroy plaintiffs' exempt status. Because it made the deductions for "reasons other than lack of work," promised to reimburse those plaintiffs whose pay was improperly reduced, and promised to comply with FLSA in the future, CHA claims that the exemption is in tact. See id.

Plaintiffs contend that the window of correction is not available to CHA. According to plaintiffs, the window of correction can only be used to correct inadvertent, not intentional or policy-based, violations of the statute. Moreover, plaintiffs claim, even if the remedial provision were available, CHA has not complied with it.

A recent Supreme Court case, *Auer v. Robbins, 519 U.S. 452, 137 L. Ed. 2d 79, 117 S. Ct. 905 (1997)*, disposes of the parties' first dispute. Like plaintiffs, the petitioners in Auer argued that the window of correction is open only to those who inadvertently make prohibited deductions. The Court disagreed, saying:

> Petitioners contend that the initial condition in the [window of correction] is not satisfied here because the deduction from Guzy's pay was not inadvertent. That it was not inadvertent is true enough, but the plain language of the regulation sets out "inadverten[ce]" and "made for reasons other than lack of work" as alternative grounds permitting corrective action. . . . Respondents are

> entitled to preserve Guzy's exempt status by complying with the [the window of correction] provision in § 541.118(b).

*117 S. Ct. at 912.* With this statement the Court resolved an interpretative battle being waged in the lower courts: the inadvertence and lack of work clauses of the regulation must be read disjunctively, not conjunctively.

Certainly, the fact situation before the Auer Court was different from that present in this case. Unlike CHA, the defendants in Auer did not have a policy of permitting improper deductions and only one of the plaintiff's pay had been docked. CHA, on the other hand, admits that it improperly docked numerous plaintiffs' salaries and that it did so pursuant to an established policy. But the Auer Court did not limit its interpretation of the regulation to the facts of the case before it. Nor, did it hold, as plaintiffs claim, that the window of correction can only be used "when there is no pattern or practice of improper deductions." (Pls.' Reply Mem. in Supp. of Mot. for Summ. J. at 5.) Rather, the Court broadly stated that the window of correction is open in all situations but one: when an employer takes prohibited pay deductions because of a lack of work.

The Seventh Circuit has not addressed the issue of policy-based pay deductions since Auer was decided. However, three other Circuit Courts of Appeal have determined that Auer allows employers who make intentional or policy-driven deductions to use the window of correction. See, e.g., *Davis v. City of Hollywood, 120 F.3d 1178, 1180 (11th Cir. 1997)* (relying on Auer to uphold City's use of

window because it "made deductions for disciplinary suspensions, not for lack of work"); *Childers v. City of Eugene, 120 F.3d 944, 947 (9th Cir. 1997)* (noting that Auer effectively overturned circuit precedent forbidding use of the window when a policy subjects employees to prohibited deductions); *Balgowan v. State of New Jersey, 115 F.3d 214, 219 (3rd Cir. 1997)* (finding that Department of Transportation did not have a policy or practice of improper docking, but noting that it could have used the window of correction even if it had docked salaries).

Plaintiffs' reliance on this Court's opinion in *Pautlitz v. Naperville, 781 F. Supp. 1368 (N.D. Ill. 1991)* and other pre-Auer opinions is misplaced. Though this Court, and others, interpreted the regulation to require "that the deductions . . . be[ ] made both inadvertently and for reasons other than a lack of work," *Pautlitz, 781 F. Supp. at 1373* (emphasis added), those interpretations were rendered without guidance from the Supreme Court. The Auer Court provided that guidance and resolved any doubt about the correct interpretation of the regulation. Though plaintiffs argue strenuously for the opposite result, this Court is bound to follow the interpretation set forth in Auer.[1] Accordingly, the Court holds that defendants are entitled to use the window of corrections.

---

1. That does not mean the Court would disregard Auer, even if it could. As appealing as plaintiffs' arguments are, there are equally persuasive arguments in favor of the Court's interpretation. The Court's interpretation comports with the plain language of the regulation, it immunizes employers who mistakenly adopt policies permitting prohibited deductions, and it saves large employers, like municipalities, from the expense of FLSA liability caused by the repeated and intentional actions of ill-informed supervisors.

*Appendix D*

The next question is whether defendants have actually complied with the remedial requirements. Defendants claim that they have because they adopted a resolution affirming their future compliance with FLSA, and have promised to reimburse to plaintiffs all improper deductions. Plaintiffs disagree, claiming that defendants' "promises" of reimbursement and future FLSA compliance are illusory.

There is no dispute that CHA has promised to reimburse to plaintiffs all improper deductions. It also undisputed that CHA has not yet reimbursed any of the plaintiffs for deductions it admits it made as many as five years ago. According to plaintiffs, this five-year lapse casts serious doubt on the sincerity of CHA's reimbursement promise.

Once again, Auer disposes of this issue. Like plaintiffs, petitioners in Auer argued that their employer had not complied with the window of correction because it had not reimbursed the one employee whose pay was docked. Like CHA, the employer in Auer promised reimbursement once a final decision was rendered in the case. (See Br. of Resp't in *Auer, 1996 WL 585691* at *16.) The Court held that the promise was sufficient because "[t]he language of the regulation does not ... address the timing of reimbursement" and the Secretary of Labor "does not interpret it to require immediate payment." *117 S. Ct. at 912.* CHA's promise to reimburse plaintiffs "[u]pon a final judgment that [it] can avail itself of the Window of Correction rule" satisfies the standard set forth in Auer.

The same is not true, however, for CHA's promise of future compliance with FLSA. Though CHA vowed to comply with the statute in its August 1997 Resolution,

the parties dispute whether it actually did. CHA, of course, claims that the Resolution "corrected the policies and practices complained of by plaintiffs." (Defs.' Local Rule 12(n) Statement, ¶ 1.) Plaintiffs, however, contend that CHA's practice of deducting pay for minor rule violations and temporary military leave continues unabated. (Pls.' Resp. to Defs.' Local Rule 12(n) Statement, ¶ 1.) The correction window requires a promise but clearly a promise in good faith with an expectation of living up to its strictures. Thus, there is a genuine issue of material fact as to whether CHA actually complied with FLSA — and thus, the window of correction — after it adopted the Resolution.

Overtime Payment

Plaintiffs also claim that CHA destroyed their exempt status by paying them overtime. As an initial matter, plaintiffs' position is in tension with the plain language of the regulations. Section 541.118(b) specifically provides that "additional compensation besides the salary is not inconsistent with the salary basis of payment." As a result, this Court and others have held that payment of overtime does not automatically vitiate exempt status. See *Pautlitz, 781 F. Supp. at 1371* (treating overtime as a bonus scheme that does not defeat exempt status); *Michigan Ass'n of Governmental Employees v. Michigan Dep't of Corrections, 992 F.2d 82, 84 n.3 (6th Cir. 1993)* ("Although receiving [overtime] compensation . . . may seem inconsistent with general notions of salaried status, . . . it does not jeopardize salaried status as defined by the regulations.") (internal citation omitted); *York v. City of Wichita Falls, 944 F.2d 236, 242 (5th Cir. 1991)* ("Paying an hourly rate beyond the regular schedule does not defeat the executive exemption.")

(citation omitted); *Hartman v. Arlington County, 720 F. Supp. 1227, 1229 (E.D. Va. 1989)*, aff'd, *903 F.2d 290 (4th Cir. 1990)* (noting that the practice of paying additional compensation "at an hourly rate for each hour worked beyond [employee's] regular schedule" is permitted by the regulations); cf. *Klein v. Rush-Presbyterian-St. Luke's Med. Ctr., 990 F.2d 279, 284 (7th Cir. 1992)* (declining to hold that "overtime is always inconsistent with a salary"). Thus, CHA's practice of paying plaintiffs for the hours they work in excess of forty does not, by itself, render plaintiffs non-exempt.

Illinois Minimum Wage Act

Finally, plaintiffs contend that they are entitled to summary judgment on their Illinois Minimum Wage Act claim because "an employee who is non-exempt under the FLSA (e.g., hourly paid), is also hourly paid under the Illinois Minimum Wage Act." (Pls.' Mem. in Supp. of Mot. for Summ. J. at 11.) As set forth above, there are genuine issues of material fact on plaintiffs' claim that they are non-exempt, hourly workers under FLSA. Thus, genuine issues of material fact also exist on plaintiffs' claim that they are hourly workers for the purposes of the Illinois Minimum Wage Act.

Conclusion

For the reasons set forth above, plaintiffs' motion for partial summary judgment is denied.

ENTER:

Paul E. Plunkett
UNITED STATES DISTRICT JUDGE

*Appendix D*

AGREED ORDER

This matter coming to be heard on the Motion to Approve Settlement, due notice having been given and the Court being fully advised in the premises:

IT IS HEREBY ORDERED THAT this matter is dismissed:

1. The Avery plaintiffs and the CHA have agreed to settle their Fair Labor Standards Act and pendent state claims.

2. The Avery plaintiffs are not members of and have opted out of the Johnson v. CHA, 94 C 7692 class action currently pending in the Northern District of Illinois.

3. The Avery case is hereby dismissed with leave to reinstate within 60 days.

4. This court retains jurisdiction for enforcement of and/or resolution of any disputes regarding the settlement.

11-19-97

ENTERED:

Paul E. Plunkett
JUDGE

**APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IN *MARTIN, etc. v. W.E. MONKS & COMPANY, et al.* DATED AND FILED AUGUST 3, 1993**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

92-3739

LYNN MARTIN, SECRETARY,
DEPARTMENT OF LABOR,

Plaintiff-Appellee,

v.

W.E. MONKS & COMPANY AND
EDGAR EDWARDS,

Defendants-Appellants.

August 3, 1993, Filed

* * *

JUDGES: BEFORE: MERRITT, Chief Judge, KEITH and SUHRHEINRICH, Circuit Judges.

OPINION: Defendants-Appellants, W.E. Monks & Company ("Monks") and Edgar Edwards ("Edwards"), appeal a district court judgment for the Secretary of Labor ("Secretary"), in an action brought under Section 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, et seq. ("the FLSA"). For the reasons stated below, we AFFIRM the judgment of the district court.

*Appendix E*

I.

The Secretary filed this suit on August 12, 1987, against Monks and its president and majority shareholder, Edwards, for failure to pay employee overtime wages, in violation of the FLSA. The FLSA requires employers to pay their employees one and one-half their regular pay rates for overtime, defined as all hours worked in excess of 40 in a work week. See 29 U.S.C. § 207. The FLSA, however, exempts employees that are executives, administrators and professionals from its overtime provisions. See 29 U.S.C. § 213.

After a four day bench trial, the district court entered a Memorandum and Order dated June 3, 1992, in favor of the Secretary. On June 4, 1992, the court entered a judgment enjoining Monks from continued withholding of back wages in contravention of the FLSA. The court also ruled that Monks should pay $19,517.14 in unpaid overtime compensation and that Edwards was liable as an employer due to his role as Monks' president and majority shareholder. Monks and Edwards ("the defendants") filed joint appeals, raising two issues regarding the district court's judgment. These issues are discussed seriatim below.

II.

The defendants contend that the district court erred in its determination that thirteen of its employees were not salaried employees, and thus exempt from the overtime compensation provisions of the FLSA. In its Memorandum and Order, the district court summarized the evidence against the defendants as follows:

*Appendix E*

The alleged violation at the heart of this action is improper overtime compensation of thirteen Monks employees, generating an overtime pay shortage of $19,517.14. The Secretary alleges that these draftsmen, designers, and engineers are paid regular hourly rates multiplied by their hours worked, not compensated at rates for hours worked over eighty in a two-week pay period as required.

During trial of this action, the Secretary produced witnesses, including Monks' employees and U.S. Department of Labor investigator Deborah Board, to establish that thirteen Monks' employees were deprived of the full overtime compensation as provided in the FLSA. The former and current Monks' employees testified that they were never paid the statutory rate for overtime when they worked more than eighty hours in a two-week pay period. In fact, former Monks' employee Eugene Griffin stated that, after the initial Labor Department investigation in 1986, defendant Edwards told employees to record at least forty hours in each work week, even when they did not work forty hours, and then work more than forty hours the next work week to total an even eighty hours per pay period. Employees continued to be paid "straight time," not one and one-half their "straight time" rates, for overtime work.

(Memorandum and Order at page 6-7) (citations and footnote omitted). Investigator Board reviewed payroll records,

employee earnings records, and employee time sheets in reaching a determination that Monks was in violation of the FLSA's overtime compensation provisions. The Secretary alleged that the following Monks employees did not receive adequate overtime compensation: Richard Braddock ($40.80), Michael Geary ($5,128.64), Eugene Griffin ($3,672.48), Thomas Howard ($2,090.57), Adel Magaziner ($1,771.68), Laura Martino ($1,714.69), Todd Miller ($2,521.34), Todd Borton ($94.21), James Brooks ($680.57), Robert Garrity ($1,345.75), Daniel Grieshop ($354.18), George Lucas ($57.23), and Dan Milosevich ($45.00). (Memorandum and Order at page 7-6).

The defendants contend that this Court should review de novo the district court's finding regarding whether the employees were paid on a salary basis. They rely on Brock v. Mr. W. Fireworks, Inc., 814 F.2d 1042 (5th Cir. 1987), as support for this proposition. In Brock, the Fifth Circuit addressed the legal standards for determining employee status under the FLSA, stating that:

> The ultimate finding as to employee status is not simply a factual inference drawn from historical facts, but more accurately is a legal conclusion based on factual inferences drawn from historical facts. We thus have held repeatedly that the ultimate determination of employee status is a finding of law subject to de novo consideration by this court.

814 F.2d at 1045. The Brock Court went on to explain that a court's factual findings regarding employee status is subject

to the clearly erroneous standard of review, while the ultimate determination of employee status is subject to plenary or de novo review. We agree with this approach and find that it is consistent with Rule 52(a) of the Federal Rules of Civil Procedure. Rule 52(a) states that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Fed.R.Civ.P. 52(a).

Accordingly, we review the district court's findings of fact regarding whether the employees at issue were salaried employees under the FLSA by applying the clearly erroneous standard. We review de novo the district court's ultimate determination of whether the employees at issue were salaried employees and thus exempt from the FLSA's overtime compensation provisions.

The district court found that it was "evident from the pay records included as exhibits in this trial" that each of the employees at issue in this suit "worked more than eighty-hours in certain eighty-hour pay periods and that they were compensated at their regular rates instead of one and one-half times those rates." (Memorandum and Order at page 8). As the district court noted, "[t]he defendants do not dispute that the employees sometimes worked more than eighty hours in certain pay periods and that these employees were compensated for the extra hours at their regular rate." Id. Accordingly, the district court found that the employees at issue were not compensated at one and one-half times their regular salary for overtime work.

*Appendix E*

As a defense to the Secretary's allegations of overtime violations, the defendants contend that the employees at issue are exempt from the FLSA's overtime provisions because they are "professional" employees. The exemption of professional employees from the FLSA's overtime provisions is found at 29 U.S.C. § 213 and provides, in pertinent part, as follows:

> (a) The provisions of sections 206 and 207 of this title shall not apply with respect to —
>
> (1) any employee employed in a bona fide executive, administrative, or professional capacity, or in the capacity of outside salesmen. . . .

As the district court noted, 29 C.F.R. § 541, et seq. provides the factors to be considered when determining if an employee is a "professional" exempt from the FLSA's overtime provisions found at 29 U.S.C. § 207. (See Memorandum and Order at page 9). The district court correctly noted that when determining whether employees are "professionals" as defined under 29 C.F.R. §§ 541.311(a) and 541.313, "at the onset of the analysis the FLSA is clear that a professional employee must be compensated on a salary or a fee basis, not hourly." Id. at 11 (citations omitted).

The district court concluded that the employees at issue were not salaried employees, explaining its ruling as follows:

> Evidence shows that the employees' billable work rates were based upon an annual

compensation figure, what each would receive if he or she worked full-time, forty hours per week. However, testimony clearly shows that employees were never guaranteed that annual amount, barring absences of one day or more. In fact, on certain occasions, employees worked fewer than forty hours in a week and received less than a full period's pay, even if those absences were for less than one day. In short, employees might have been led to believe they would receive a certain salary amount but were not guaranteed that amount and often did not receive that amount, regardless of absences allowed under the FLSA.

In fact, in an apparent attempt to compensate employees with a "regular" amount, defendant Edwards instructed employees to declare that they worked forty hours in a week on their time sheets, regardless of their actual hours worked, to receive their allotted amount in pay. However, they were told to "make up" the following week any hours that they had actually worked below forty the previous week, thereby working more than forty hours during that second week. Employees were paid for these extra hours at their hourly rates. Employees were paid less for days in which they worked less than the full day. This reduction is in direct opposition to the regulation's requirements for salary compensation. At other times, employees were instructed to assign part-day absences to vacation or sick leave time.

(Memorandum and Order at pages 13-14) (citations omitted). We find no reversible error in the court's findings that the employees at issue were not salaried employees. Additionally, we find no reversible error in the district court's ultimate conclusion that the employee's at issue were not "professionals" exempt from the FLSA's overtime provisions.

III.

Even if the employees at issue are found to be hourly employees rather than salaried employees, the defendants contend that the district court erred in its determination that the "window of correction" provision, 29 C.F.R. § 541.118(a)(6), was inapplicable in the instant case. Section 541.118(a)(6) provides, in pertinent part:

> [W]here a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

The district court ruled that the "window of correction" did not apply because "[t]here was no inadvertence" in the defendants method of paying its employees and "the employees were not salaried." (Memorandum and Order at page 16). As support for its ruling, the court cited Martin v. Malcolm Pirnie, Inc., 949 F.2d 611 (2nd Cir. 1991), cert. denied, __ U.S. __, 121 L. Ed. 2d 222, 1992 U.S. LEXIS 6320, 113 S. Ct. 298 (1992). We agree with the court's ruling

that the "window of correction" is unavailable to the defendants. However, the court misinterprets the requirements for the applicability of the "window of correction" by construing inadvertence as a requirement of § 541.118(a)(6).[1]

The correct interpretation of § 541.118(a)(6) is stated in Keller v. City of Columbus, Indiana, 778 F. Supp. 1480, 30 Wage & Hour Cas. (BNA) 1095, No. IP 89-179-C (S.D. Ind. 1991), where the court wrote:

> Whether the policy allowing hourly deductions was inadvertent need not be considered. The regulation provides that the "window of correction" option applies when a deduction is inadvertent "or is made for reasons other than lack of work." . . . In this case, the policy allowed a deduction for missing work, not because there was a lack of work. The tangential debate about whether temporal duration of the policy qualified as "inadvertent" is unnecessary.

Id at 40. Thus, the "window of correction" applies when an employer establishes that its employees were salaried employees and that the impermissible deductions from their salaries "is inadvertent, or is made for reasons other than lack of work." 29 C.F.R. § 541.118(a)(6) (emphasis added).

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1. We note that the Malcolm Pirnie Court, like the district court in the instant case, appears to have similarly misconstrued 29 C.F.R. § 541.118(a)(6). See Malcolm Pirnie, 949 F.2d at 615-617.

In this case, the deductions were made because the employees chose to absent themselves from work, not because there was a lack of work. Making deductions for personal time absences of less than a day is not permitted under the FLSA, but is insufficient to deny the employer the exemption, provided the other requirements of § 541.118(a)(6) are met. Since the employees at issue in this case were not paid as salaried employees, § 514.118(a)(6) is not available to the defendants. See Dole v. Walker and Armstrong, 763 F.Supp 1052, 1054 (D. Ariz. 1990) ("Because defendants' employees are not paid on a salary basis and thus not exempt under the Fair Labor Standards Act, there is no preservable exempt status under § 541.118(a)(6)."). Accordingly, we agree with the district court's ruling that the defendants were not entitled to a "window of correction" exemption.

IV.

For the foregoing reasons, we AFFIRM the judgment of the Honorable John D. Holschuh, United States District Judge for the Southern District of Ohio.

*Appendix E*

DISSENT BY: MERRITT

DISSENT: MERRITT, Chief Judge, dissenting. I agree with the majority that the factual findings of the district court are to be reviewed under the clearly erroneous standard. Based on my examination of the record, I believe those findings of fact are substantially correct. However, as the majority points out, the ultimate determination as to whether the employees in question are paid on an "hourly" or "salaried" basis is a question of law, reviewable de novo. I do not agree that, under a proper application of the FLSA regulations, the district court's factual findings can support its legal conclusion that the employees in question were paid on an hourly basis. This is especially true when the "window of correction" provision, 29 C.F.R. § 541.118(a)(6), is duly applied to excuse the two instances in which employees were improperly denied full compensation for a 40-hour workweek.

Defendant Marks is a small firm. The outcome of this litigation directly affects only 13 present and former employees who worked overtime during a period of several years; four of them are entitled to less than $100 each in back pay under the majority's ruling. However, the remaining employees add to this substantially, accounting for a total of nearly $20,000 to be assessed against the defendant firm, and I believe the justifications for doing so merit greater (and more critical) scrutiny than was afforded by the majority.

The district court's opinion, quoted at some length by the majority, slip op. at __, indicates two primary factors

driving its conclusion that defendants' employees were paid on an hourly, as opposed to a salaried, basis. Defendant Edwards instructed the employees to declare on their time sheets that they worked 40 hours each week even if they actually worked fewer hours that week. Although the employees were expected to "make up" any deficit in actual hours worked by working extra hours during subsequent weeks, those hours, if reported as hours in excess of 40, would be compensated at the computed hourly rate of each employee, over and above their normal salary for the week. I believe this factual finding works in favor of defendants, rather than against them. Defendants assured this court at oral argument that the only penalty for continued failure to report to work during the normal business hours kept by the firm is the penalty reserved for any employee in any workplace for failing to meet the expectations of the employer: the threat of dismissal. As long as the employees perform enough work over an extended period of time (billed directly through to the firm's clients on an hourly basis) to justify their salaries, all would be well. This arrangement bears a striking resemblance to a law firm in which billable hours ultimately count far more in determining an associate's worth to the firm than the number of hours spent inside the building in any particular week.

The other finding which apparently influenced the district court's conclusion regarding pay status was that employees sometimes worked fewer than 40 hours in a single week during a pay period and consequently were paid less than the "predetermined amount constituting all or part of" their compensation, 29 C.F.R. § 541.118(a). First, this finding is facially inconsistent with a policy directing

employees to declare 40 hours each week regardless of actual hours worked; it would be extremely hard for the employer to simultaneously enforce both policies. Second, a careful examination of the record reveals that only six of the thirteen employees ever had their pay reduced for any reason. Of those six, four had deductions made for reasons that are fully covered and excused by the FLSA regulations. For example, George Lucas began and completed his term of employment in the middle of pay periods, and thus was not paid for the one-week portions of those periods during which he was not employed. This policy is expressly permitted under subsection 541.118(c). He also took a week's vacation for which he had not accumulated leave time, and defendants did not pay him for that week. This policy as well is expressly permitted; see subparagraph 541.118(a)(2). The isolated deductions from the paychecks of Adel Magaziner, Eugene Griffin, and Robert Garrity were similarly valid (under subparagraphs (a)(3), (a)(2), and (a)(2), respectively). Only Todd Borton and Todd Miller had deductions made that may have been violative of the regulations.

My reading of the record thus indicates violations of the regulations affecting at most two employees for a minute total of 11 hours from a period in which all employees were compensated for some 175,000+ hours, or roughly six thousandths of one percent. The "window of correction" provision, § 541.118(a)(6), is tailor-made for such a situation. The majority properly concludes that such deductions may be excused even if not inadvertent; the subsection expressly applies to deductions made for reasons other than "when there is no work available," if the employer corrects its mistake and promises to comply in the future. But the

majority then totally eviscerates the provision by denying the exemption to defendants, "[s]ince the employees at issue in this case were not paid as salaried employees." Slip op. at __. This presents a tautology from which no employer could possibly escape: The employees are not salaried because impermissible deductions were made. Those deductions are impermissible (and not excused under the "window of correction") because employees have been found to be not salaried. If, as the majority implies, the employees' deductions could be excused under the window of correction if not for the earlier finding of non-salaried status, then it follows that those deductions should not be considered in making the pay status finding.

I find no evidence of hourly pay status in the policy of declaring 40 hours per workweek regardless of actual hours work; as I have explained, this rather leads to the contrary conclusion. Likewise, I find no inexcusable deductions to have been made from the salaries of defendants' employees. The district court's conclusion that the employees were paid on an hourly rather than a salaried basis is therefore bereft of support. The employers in this case have done nothing which should deny them the exemption from overtime compensation provided by the Secretary's own regulations. I dissent.

**APPENDIX F — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS IN *REICH, etc. v. IBP, INC.* DATED AND FILED MARCH 21, 1996 AND ENTERED MARCH 22, 1996**

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

CIVIL ACTION No. 88-2171-EEO

ROBERT B. REICH, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

IBP, INC.,

Defendant.

March 21, 1996, Dated
March 21, 1996, FILED; March 22, 1996, ENTERED

* * *

JUDGES: EARL E. O'CONNOR, United States District Judge

OPINION BY: EARL E. O'CONNOR

*Appendix F*

MEMORANDUM AND ORDER

This action, filed by the Secretary of Labor, United States Department of Labor ("USDOL"), alleges that defendant, Iowa Beef Packers ("IBP"), violated sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended *29 U.S.C. § 201* et seq. (the "FLSA"), during the period from April 1, 1986, to August 1, 1988 (the "relevant period"). Pursuant to section 17 of the FLSA, *29 U.S.C. § 217*, the Secretary seeks an order enjoining defendant from withholding back wages due for compensable activities during the relevant period, and from future violations of the overtime and recordkeeping provisions of the FLSA, *29 U.S.C. §§ 207, 211(c)* respectively. The Secretary also seeks pre-judgment interest from the date the unpaid wages were due.

The trial of this case was bifurcated. During the first phase, the court determined that certain pre-shift and post-shift[1] activities by workers at defendant's meatpacking plants are compensable. *Reich v. IBP, Inc., 820 F. Supp. 1315 (D. Kan. 1993)*, aff'd, *38 F.3d 1123 (10th Cir. 1994)*. The second phase of the trial, which was tried to the court over four days commencing July 10, 1995, involves the following issues: (1) the amount of time spent per day by employees performing compensable activities; (2) whether the time involved was de minimus; (3) whether pre-judgment interest should be awarded; and (4) whether the court should permanently enjoin defendant from future violations. The court, after considering all the evidence presented at trial

1. As used in this opinion, "pre-shift" and "post-shift" refer to before and after the production shift, not the workday.

and the briefs submitted by the parties, hereby incorporates all factual findings from the first phase of the trial, and makes the following additional findings of fact and conclusions of law, pursuant to Federal Rule of Civil Procedure 52(a).

Findings of Fact

1. As determined in Phase I, the following pre-shift activities constitute "work" under the FLSA: putting on protective gear, waiting at the knife room, exchanging or sharpening dull knives, and walking from the knife room to the work station. Post-shift activities found to be "work" include: walking from the work station to the wash area, waiting at the wash area, removing and washing protective gear, and returning knives to the knife room. Defendant neither recorded nor paid its employees for the time it took to perform these activities.

2. The parties have stipulated to the following:

(1) The court has jurisdiction over the parties and subject matter of this action;

(2) Phase II involves only employees who carried knives or other meat cutting utensils in the performance of their jobs (the "knife carriers");

(3) A formula for calculating the amount of back wages due for the period April 1, 1986, to August 1, 1988 (the "relevant period");[2]

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2. The stipulated formula is based on an average hourly rate of pay of $7.10 and an overtime rate of pay of $10.65, 5.4 average

(Cont'd)

(4) The Secretary identified and sent questionnaires to 23,580 persons who were production employees during the relevant period. A random sample of employees who returned the questionnaire were deposed. Defendant's counsel was present and conducted cross-examination at each deposition; and

(5) From the deposition answers, as set forth in the parties' deposition stipulations (Doc. #194), the Secretary developed a data base. At trial and in its post-trial briefs, defendant states that it stipulates only that the deponents gave the answers listed at the deposition pages cited, but does not stipulate that the deponents did not give another time estimates elsewhere in their depositions.

3. Despite the above stipulations, the parties have employed very divergent methods in arriving at and presenting evidence of the amount of compensable time. Neither approach is without some serious flaws. In our synthesis of the vast amount of evidence presented in this case, we have considered the relative merits of the two approaches and the credible information generated by each.

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(Cont'd)
workdays for each workweek, and 334,575 workweeks. Under the formula, wages of $.9585 are due for each additional compensable minute of each workday of each workweek. Under the stipulated formula, the number of minutes per day of compensable activities is the only remaining variable to be determined on the issue of back wages.

*Appendix F*

4. Plaintiff's methodology consisted of mailing a questionnaire, along with a stamped, self-addressed envelope to 23,580 IBP production employees who worked sometime during the relevant period. From the 5,743 questionnaire respondents (4,331 were knife carriers), plaintiff randomly selected 485 employees (378 knife carriers) to be deposed. Plaintiff recorded the employees' deposition estimates of the amount of time they spent performing various pre-shift and post-shift activities in a database. From that database, plaintiff compiled a mean time of 24.68 minutes, the time plaintiff urges the court to adopt as the reasonable compensable time at issue.

Plaintiff's statistics expert, Dr. Kukuk, testified that the mean time of 24.68 minutes was within a 95% confidence interval. This means that if all 4,331 knife carriers testified, there is a 95% chance that the arithmetic mean of their testimony would fall within the range of 23.3 to 26.06 minutes. However, Dr. Kukuk admitted that this compilation was only as valid as the underlying data supplied to him by plaintiff. If the estimates given were inaccurate, his statistical compilation would similarly be inaccurate.

5. Defendant utilized a time study to arrive at what it asserts is the reasonable amount of compensable time at issue. Defendant hired Dr. Konz, an industrial engineering expert, to conduct the time study. Dr. Konz worked with defendant's industrial engineering staff to gather the data for the study. The IBP industrial engineers broke various tasks into their component parts, and used a stopwatch to time employees performing each part of a task. To arrive at wait times, they conducted computer simulations based on

observed arrival and wash rates. Defendant submits a total reasonable time, as generated by its time study, of 4.65 minutes.

6. Each finding of fact set forth in the foregoing that is more properly deemed to be a conclusion of law is hereby found to be a conclusion of law. Likewise, any conclusion of law that is more properly deemed to be a finding of fact is hereby found to be a finding of fact.

Conclusions of Law

The total amount of compensable time.

The Secretary relies on the employee's estimate of the actual time required to perform the various tasks. In *Anderson v. Mt. Clemens Pottery, 328 U.S. 680, 687-88, 90 L. Ed. 1515, 66 S. Ct. 1187 (1946)*, the Supreme Court approved the use of employee estimates of uncompensated time where the employer had failed to keep adequate records. The Court stated,

> When the employer has kept proper and accurate records the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such

> a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act.

Id.

The Court outlined an analytic framework for FLSA claims in situations where time records are not available. An employee bears the initial burden of proving that he or she performed work which was not properly compensated by producing sufficient evidence to show the amount and extent of the work performed as a matter of just and reasonable inference. Id. If the employee meets this burden, the burden then shifts to the employer to come forward with evidence showing the precise amount of work performed or negating the reasonableness of the inference to be drawn from the employee's evidence. Id. If an employer fails to produce such evidence, the court may award damages to the employee, even though they are based on an approximation. The Supreme Court explained,

> The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of § 11(c) of the Act. And even where the lack of accurate records grows out of a bona fide mistake as to whether certain activities or nonactivities constitute work, the employer, having received

> the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances. . . . It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of the damages.

*328 U.S. at 688.*

Under Mt. Clemens, the time estimates presented by plaintiff satisfy the initial prong of the analysis. See also *Hodgson v. Humphries, 454 F.2d 1279, 1283 (10th Cir. 1972)*. However, plaintiff's time estimate will be reduced because defendant has come forward with evidence negating the reasonableness of the 24.68 minutes of total time urged by plaintiff. Several factors lead us to the conclusion that plaintiff's aggregate time estimate is somewhat overstated.

First, plaintiff's data is based on the employees' depositions. In the depositions, plaintiff asked the employees to estimate the time involved in performing routine pre-shift and post-shift activities that occurred months or years earlier. The employees did not know at the time they performed the activities that they would be asked to estimate the amount of time involved. Thus, they were, naturally, less conscious of the actual time involved. Even ignoring the employees' personal interest in the case, we question the employees' ability, under the circumstances, to accurately recall the amounts of time involved in each activity. Moreover, even assuming the employee's estimates are accurate to a degree, they are still estimates of the actual time involved, rather than the reasonable time necessarily required. In addition,

our review of the record reveals several instances where time for noncompensable activities could not be separated from the aggregate time estimates given by employees.

Second, as defendant's experts testified, a person's estimate of perceived time often exceeds actual time. Defendant's cross examination of Keith Hatcher demonstrates this point. When defendant asked Mr. Hatcher on cross examination to indicate the time interval involved for a particular task and timed that interval, the actual time was significantly less than Mr. Hatcher's earlier perceived time estimate. In addition, the aggregate total given by an employee on direct examination often exceeded the combined time for individual estimates of the various activities as stated in cross examination.

As a result, plaintiff's aggregate time estimate of 24.68 minutes is somewhat overstated. The court finds that the high-end estimates, which were included in the 24.68 mean, are not credible in that they clearly overstate any reasonable estimation of time required for compensable activities. We recognize that plaintiff's mean estimate also includes unrealistically low estimates and that the mean represents an average of the employee's estimates. However, review of plaintiff's database reveals that the number of overestimations far exceeds the number of underestimations. For example, there are over eighty instances of estimates in excess of thirty-minutes. Yet, there are only thirty estimates under ten minutes, and thirteen under eight minutes. On balance, this supports our conclusion that plaintiff's weighted average estimate is overstated.

*Appendix F*

Plaintiff presents Dr. Kukuk's standard deviation and confidence interval analysis to counter this problem. Although we acknowledge the validity of plaintiff's methodology from a statistical perspective in projecting what the larger population of 4,331 knife carrier questionnaire respondents would have said if deposed, we question the validity of projecting plaintiff's estimate beyond that point to the entire population of IBP employees during the relevant period. Moreover, the proper measure is not the actual time spent, but the reasonable time required.[3]

In this case, we believe that time estimates based on observed clocked time, rather than memory estimates, provide a more accurate measure of the reasonable time involved.[4] However, in our opinion, defendant's time study suffers from numerous infirmities as a measure of the reasonable time involved during the relevant period. Underlying many of these problems is the fact that defendant's study was conducted without the knowledge of, or any input from, plaintiff.

Defendant's overall data compilation is suspect for several reasons. First, defendant did not even attempt to

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3. The reasonableness of actual wait times is discussed below.

4. This is not a case where all of the pre-shift and post-shift activities at issue were compensable. Compare *Donovan v. Hudson Stations, Inc., No. 77-2171, 1983 WL 2110, 99 Lab. Cas. (CCH) ¶ 34,463* (D. Kan. October 14, 1983) (adopting time estimates given by employees in their depositions). Rather, because compensable and noncompensable activities were intermingled here, our task is to isolate the amount of time spent in compensable activities so that it may be compensated.

measure some elements of compensable time, such as the knife room wait time. Also, the integrity of defendant's data compilation is compromised because many observed times for compensable activities are inexplicably omitted from defendant's compilation.

Second, in compiling its data, defendant's industrial engineers hand-picked the employees to be timed and informed the employees and their supervisors prior to the timings. Defendant's industrial engineers rated the employee's performance of a task, with "normal" performance being rated at 100%. Although in choosing which employees to time, the industrial engineers were to select employees who were capable, skilled, and trained (presumably, employees who perform at 100%), in arriving at their "reasonable" times, the industrial engineers still adjusted a significant number of observed times downward, based on performance ratings of less than 100%. Performance ratings below 60% were eliminated entirely from the defendant's data. This subjective performance rating system seriously undermines the credibility of defendant's data as a measure of the stopwatch time involved.

Third, working conditions at defendant's plants during defendant's time study differed significantly from the working conditions during the relevant period. Numerous on-line washing facilities and communal wash stations were installed in 1988. These changes reduced the amount of time spent by employees waiting and washing protective gear.

The knife exchange process measured by defendant (i.e., dropping dull knives in a bucket and picking up

sharpened knives previously laid out) differed significantly from the knife exchange process during the relevant period (i.e., waiting for a person to take the dull knife and supply a sharpened knife) in that the human element was eliminated. Thus, the knife exchange time observed by IBP was shorter than the reasonable measure of time required to exchange knives during the relevant period. Considering all the credible evidence, we conclude that the reasonable average wait and exchange time at the knife room is three minutes.

After examining the various pieces of protective gear admitted into evidence, considering the in-court demonstration and other evidence with regard to an employee putting on and taking off gear, the court concludes that an average reasonable combined time required to put on and take off personal protective gear is three minutes.

As a practical matter, wait time cannot be considered in terms of what is reasonable. Employees were forced to wait at wash stations until a hose became available, whether or not the amount of wait time required was reasonable. Also, defendant's wait and wash data included non-knife carriers. This reduced defendant's observed times because non-knife carrying employees generally had less clean-up. For these reasons, the employees' estimates of the wait time are somewhat more helpful than defendant's simulated wait time. However, we question the accuracy of some of the longer wait time estimates given by employees. In light of all of the evidence presented regarding how long employees waited in line to clean their protective gear, we conclude that the average wait time during the relevant period is three minutes. This figure comports with many of the estimates given by

employees, and reflects an increase over defendant's simulated wait times because additional wash stations and on-line facilities reduced the observable wait at the time of defendant's time and motion study.

The court has also considered all of the evidence of the types of protective gear worn, how soiled the gear became, and the necessary clean-up. The reasonable amount of time required to clean the protective gear varied somewhat depending on the job the employee performed. Clean-up involved hosing down all soiled equipment (other than sanitary outergarments) with hot water to wash away all blood and meat and to dissolve fat. Based on all the evidence, we conclude that a reasonable average post-shift clean-up time is two minutes.

We believe that defendant's simulated walk time somewhat understates the reasonable walk time. The 2.94 miles-per-hour walk rate used by defendant, as was demonstrated in the staged walk time videotape,[5] is an unreasonably brisk pace given the wet floor conditions and other employee traffic, which would be present during a normal shift change. After careful consideration of all of the evidence regarding compensable walk time, i.e., walk time between the knife room and the production floor, we conclude that the average reasonable combined pre-shift and post-shift walk time is three minutes.

All the evidence presented with regard to the protective gear worn by employees and the necessary clean-up, the

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5. We note that the testimony was that the pace in the video was somewhat faster that the 2.94 rate used in defendant's study.

physical plant facilities, and the walk distances, lead us to the conclusion that fourteen minutes is the total average reasonable time involved for all compensable pre-shift and post-shift activities.

The de minimus doctrine.

The fourteen minutes required to perform the pre-shift and post-shift activities at issue are compensable, unless the time is de minimus. In *Mt. Clemens Pottery, 328 U.S. at 692*, the Court stated,

> The workweek contemplated by § 7(a) must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable work time is involved.

Thus, otherwise compensable work is de minimus if it involves only "insubstantial and insignificant periods of time spent in preliminary activities." *Id. at 693*.

There is no rigid rule or precise mathematical formula for applying the de minimus doctrine. See *Lindow v. United States, 738 F.2d 1057, 1062 (9th Cir. 1984)*; *Anderson v. Exxon Corp., 24 Wage & Hour Cas. (BNA) 364, 87 Lab.*

*Cas. (CCH) ¶ 33,844, No. S-78-192, 1979 WL 1979* at *11 (E.D. Cal. February 7, 1979). In *Lindow, 738 F.2d at 1062-64*, the court considered the following factors as relevant to the de minimus determination: (1) the amount of time involved and the size of the aggregate claim; (2) the practical administrative difficulty of recording the time; and (3) the regularity with which the work at issue was performed. Considering these factors in the context of this case, the time involved is not de minimus as a matter of law.

The fourteen minutes per day of uncompensated work performed by IBP employees is substantial and goes well beyond a "trifle" or "split second absurdity" discussed by the Supreme Court in Mt. Clemens Pottery. Defendant cites *Mt. Clemens, 328 U.S. at 692-93*, in advocating that the court evaluate each task independently to determine if it is de minimus. We do not read Mt. Clemens to mandate such an approach. While the Court discussed walking and preliminary activities separately in terms of the de minimus doctrine, we do not believe that the Court was advocating that compensable work is to be carved into its component tasks and that each task is to be evaluated separately to determine if it is de minimus. See *Lindow, 738 F.2d at 1063* (discussing and citing numerous cases relating to the aggregate claim factor); *Reich v. Monfort, No. CIV. A. 92-M-2456, 1995 WL 817796* (D. Colo. October 19, 1995) (considering aggregate time per day). Under defendant's rationale, independent de minimus determinations of each task would rarely result in findings of compensable time — work can always be subdivided into small enough tasks to be considered de minimus.

Further, defendant has failed to present any evidence to support its contention that its failure to record the time is justified by "industrial realities" or administrative difficulties. See *29 C.F.R. § 785.47*. Granted, the pre-shift and post-shift activities were not performed in any prescribed manner and the actual time spent by employees varied depending on a myriad of factors. Nevertheless, we are not convinced that, in this day of modern technology, IBP cannot record the compensable work performed by its employees. See *Saunders v. John Morrell & Co., 1992 U.S. Dist. LEXIS 21716, No. C88-4143, 1992 WL 531674, 125 Lab. Cas. (CCH) ¶ 35,827* (N.D. Iowa October 14, 1992) (three minutes spent cleaning safety equipment is recordable and is not de minimus). Moreover, IBP is certainly free to manage its employees and the process by which these compensable activities are performed so as to minimize the amount of time involved and eliminate the intermingling of noncompensable activities. The mere fact that, absent any such management, intermingling presently occurs does not make the compensable work de minimus because of an inability to record the time.

With regard to the regularity of the pre-shift and post-shift work, we are mindful that some employees may not have picked up or exchanged knives daily. The testimony reveals that most employees had to sharpen their knives themselves daily if they did not have them sharpened at the knife room. In any event, the employees used the knife room at least several times per week, if not daily. The other tasks of putting on, taking off, and washing protective gear (and the concomitant wait), occurred on a regular, daily basis. On the whole, we believe that the pre-shift and post-shift

work occurred with sufficient regularity that the de minimus doctrine does not preclude compensation.

In sum, considering the Supreme Court's description of the de minimus doctrine in Mt. Clemens and the Lindow factors, we conclude that the fourteen minutes per day of pre-shift and post-shift work at issue in the present case are not de minimus.

Pre-judgment interest.

"The overwhelming weight of authority is that pre-judgment interest should generally be included in a back pay award in an injunction action under section 17 of the FLSA, even if the underpayments were made in good faith." *Donovan v. Sovereign Security, Ltd., 726 F.2d 55, 57-58 (2d Cir. 1984)* ("[I] t is ordinarily an abuse of discretion not to include pre-judgment interest in a back-pay award under the FLSA.").

In the remedial spirit of the FLSA, we find that an award of pre-judgment interest is warranted in the instant case. Our award is designed not to punish defendant, but to make whole the employees who have, for many years now, gone uncompensated for work performed. See *Ford v. Alfaro, 785 F.2d 835, 842 (9th Cir. 1986)*; *Heiar v. Crawford County, Wis., 746 F.2d 1190 (7th Cir. 1984)*, cert. denied, *472 U.S. 1027, 87 L. Ed. 2d 631, 105 S. Ct. 3500 (1985)* (pre-judgment interest in an ADEA case); *McClanahan v. Mathews, 440 F.2d 320, 325-26 (6th Cir. 1971)* (award of pre- judgment interest is especially appropriate for wage earners). We also believe that fairness and equity weigh in favor of such an

award. See *Brock v. Richardson, 812 F.2d 121, 127 (3d Cir. 1987)* (award of pre-judgment interest prevents an employer from being unjustly enriched); *Donovan v. Sovereign Security, 726 F.2d at 57-58.*

Permanent injunction against future violations.

The Secretary's request for a permanent injunction against future violations raises issues separate and apart from the restitution injunction. See *Shultz v. Mistletoe Express Serv., Inc., 434 F.2d 1267, 1271-72 (10th Cir. 1970)* (reversing district court for failure to exercise independent discretion with respect to a permanent injunction against future violations). "Coverage under the Act does not ipso facto require the court to grant an injunction against future violations, even in the face of past violations." *Mitchell v. Hertzke, 234 F.2d 183, 186 (10th Cir. 1956).* The Secretary bears the burden of proving that an injunction against future violations is needed to prevent future violations. *Id. at 187*; see also *Buckley v. Wirtz, 326 F.2d 838, 839-40 (10th Cir. 1964).* We are mindful that an injunction is not to be issued as punishment for past violations, but as insurance against future ones. *Mitchell v. Hertzke, 234 F.2d at 186-87.* An injunction against future violations "does nothing more than require compliance with the law for the public benefit." *Triple "AAA" Co. v. Wirtz, 378 F.2d 884, 888 (10th Cir.),* cert. denied, *389 U.S. 959, 19 L. Ed. 2d 364, 88 S. Ct. 338 (1967).*

A permanent injunction is appropriate in the instant case. Significantly, IBP has not entered into any sort of agreement to comply in the future. See *Mitchell v. Lublin, McGaughy*

*& Assocs., 358 U.S. 207, 3 L. Ed. 2d 243, 79 S. Ct. 260 (1959)* (injunction unnecessary where employer agrees not to violate in the future). Moreover, IBP is also not presently in compliance. Defendant's assertions that current working conditions at its plants do not establish FLSA violations are not credible. Defendant's Director of Industrial Engineering, Tom Christensen, testified at trial that IBP employees are presently donning, doffing, and cleaning protective gear and, in some fashion, picking up sharpened knives, all without compensation. Even after the Tenth Circuit affirmed our determination of compensable activities, defendant made no effort to record or pay the employees for these activities.

Under all of the circumstances, IBP will be permanently enjoined against future violations of the overtime and recordkeeping provisions of the FLSA, *29 U.S.C. §§ 207, 211, and 215(a)(2) and (5)*, in accordance with our earlier opinion and the opinion of the Tenth Circuit, regarding the compensable pre-shift and post-shift activities. For clarity, we reject defendant's plea to limit any future injunctive relief to conditions during the relevant period. The court is not convinced that violations of the FLSA are not presently occurring despite defendant's argument that changed working conditions render the remaining time spent by employees performing compensable activities de minimus. Defendant will be required to record and compensate for time spent in compensable activities under its present working conditions.

IT IS THEREFORE ORDERED that the average, reasonable number of minutes of compensable work is fourteen (14) minutes.

IT IS FURTHER ORDERED that pre-judgment interest from the date of the violations, at the rate specified in *28 U.S.C. § 1961(a)*, is hereby granted.

IT IS FURTHER ORDERED that plaintiff shall prepare and submit an approved form of judgment within sixty (60) days from the date of entry of this order, all in accordance with this opinion.

IT IS FURTHER ORDERED that defendant is hereby enjoined from further violations of the recordkeeping and overtime provisions of the FLSA, all in accordance with this opinion. Plaintiff shall prepare and submit an approved form of injunctive order within ten (10) days from the date of entry of this order.

Dated this 21st day of March, 1996, at Kansas City, Kansas.

EARL E. O'CONNOR
United States District Judge

No. 01-76

Supreme Court, U.S.
FILED
AUG 13 2001
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

HAHN AUTOMOTIVE CORPORATION,
doing business as Autoworks, Inc.,

*Petitioner*,

-against-

KENNETH A . TAKACS, *et al.*,

*Respondents*.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

# BRIEF OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## TABLE OF CONTENTS


**Page**

TABLE OF AUTHORITIES ..... ii

STATEMENT OF INTEREST ..... 1

SUMMARY OF ARGUMENT ..... 4

REASONS FOR GRANTING THE WRIT ..... 4

I. THE PETITION SHOULD BE GRANTED SO THAT THE COURT MAY DECIDE WHETHER THE WINDOW OF CORRECTION PROVISION SHOULD BE CONSTRUED IN ACCORDANCE WITH ITS PLAIN LANGUAGE AND WITH THE COURT'S CONSTRUCTION OF THE PROVISION IN AUER V. ROBBINS ..... 4

II. DOL'S CURRENT INTERPRETATION OF THE WINDOW OF CORRECTION IS NOT CONSISTENT WITH ITS EARLIER OPINIONS CONCERNING THE PRESERVATION OF THE EXEMPTION AND THIS IS ANOTHER REASON WHY THE AGENCY'S OPINION IS NOT ENTITLED TO DEFERENCE ..... 13

CONCLUSION ..... 16

## TABLE OF AUTHORITIES


**Cases** **Page**

Auer v. Robbins,
519 U.S. 452 (1997) ..... *passim*

Balgowan v. New Jersey Department of Transportation,
115 F.3d 214 (3d Cir. 1997) ..... 7

Block v. City of Los Angeles,
253 F.3d 410 (9th Cir. 2001) ..... 11

Christensen v. Harris County,
529 U.S. 576 (2000) ..... 12

Davis v. City of Hollywood,
120 F.3d 1178 (11th Cir. 1997) ..... 6

DiGiore v. Ryan,
172 F.3d 454 (7th Cir. 1998) ..... 6, 11

General Electric Co. v. Gilbert,
429 U.S. 125 (1976) ..... 13

International Association of Fire Fighters v. City of Alexandria,
720 F. Supp. 1230 (E.D.Va., 1989), aff'd on opn. below, 912 F.2d 463 (4th Cir. 1990) ..... 7, 8

Klem v. County of Santa Clara,
208 F.3d 1085 (9th Cir. 2000) ..... 8, 9, 10, 11, 14

Kuchinskas v. Broward County,
840 F. Supp. 1548 (S.D. Fla., 1993), aff'd, 86 F.3d 1168 (11th Cir. 1996), cert. denied, 519 U.S. 1148 (1997) ..... 8

Lee v. Flightsafety Services Corp.,
20 F.3d 428 (9th Cir. 1994) ..... 8

Martin v. Malcolm Pirnie, Inc.,
949 F.2d 611, 616 (2d Cir. 1991), cert. denied, 506 U.S. 905 (1992) ..... 7

Paresi v. City of Portland,
182 F.3d 665 (9th Cir.), cert. denied, 528 U.S. 1133 (1999) ..... 6, 10

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) ..... 12

Spralding v. City of Tulsa,
95 F.3d 1492, 1503 (10th Cir. 1996), cert. denied, 519 U.S. 1149 (1997) ..... 8

Takacs v. Hahn Automotive Corp.,
246 F.3d 776 (6th Cir. 2001) ..... 3, 5, 10, 13, 14

Whetsel v. Network Proper Services, LLC,
246 F.3d 897 (7th Cir. 2001) ..... 11

Yourman v. Giuliani,
229 F.3d 124 (2d Cir. 2000), cert. denied, 121 S.Ct. 1362 (2001) ..... 2, 3, 11

Yourman v. Giuliani,
519 U.S. 1145 (1997) ..... 3

## STATUTES AND REGULATIONS

29 U.S.C. §213(a)(1).....1

29 C.F.R. §541.118(a).....1

29 C.F.R. § 541.118(a)(5).....1

29 C.F.R. §541.118(a)(6)..... *passim*

## MISCELLANEOUS

United States Department of Labor, Wage and Hour Opinion Letter (Jan. 15, 1986), available in Ginsburg, et al., Fair Labor Standards Handbook (1998), App. III, Administrative Rulings, 39 .....13, 14

United States Department of Labor, Wage and Hour Opinion Letter (July 17, 1987), 1987 WL 467862.....14, 15

The *amicus curiae* City of New York, respectfully submits this brief in support of the petition for certiorari.

## STATEMENT OF INTEREST

The *amicus curiae* City of New York ("the City") has six actions pending against it in the United States District Court, Southern District of New York, brought by over five thousand highly-paid employees who have been classified as exempt from the overtime compensation requirements of the Fair Labor Standards Act ("the FLSA") as "bona fide, executive, administrative, or professional" employees, pursuant to 29 U.S.C. §213(a)(1). This exemption is commonly referred to as "the white collar exemption." The employees in these six actions collectively seek tens of millions of dollars in overtime compensation, plus liquidated (double) damages, even though these employees willingly accepted their positions either pursuant to employment agreements that provided that the employees would receive no overtime compensation, or pursuant to collective bargaining agreements that established the parameters of their eligibility for overtime compensation.

The United States Department of Labor ("DOL") has promulgated regulations for the white collar exemption, which include provisions that exempt employees be paid on a "salary basis." 29 C.F.R. §541.118(a). In all six cases pending against the City, the only remaining claim concerns one provision of the salary basis regulation, the disciplinary deduction provision. 29 C.F.R. § 541.118(a)(5). This provision has been construed to generally preclude deductions from salary as a disciplinary penalty for exempt employees. There is no dispute that consistent with the DOL regulations, the City's employees perform the duties of exempt employees and receive salaries far in excess of those required.

Based on the frequent decisions that continue to be issued by federal courts across the country, many other

employers, in both the public and private sectors, also face massive or substantial liability, in the form of windfall awards to groups of highly-paid employees, in cases concerning the disciplinary deduction provision of the salary basis regulation. An example of the scope of the potential liability is demonstrated by just one of the City's cases, in which damages were in excess of $13.3 million, exclusive of attorneys' fees and costs. This award covered 430 plaintiffs and a four-and-one-half year liability period, which ended in 1993. However, the windfall was not evenly distributed; the employees with the highest annual salaries generally obtained the largest awards (which are then doubled through statutory liquidated damages). Approximately one hundred employees had awards between $10,000 and $50,000, approximately fifty-five employees had awards between $50,000 and $100,000, approximately thirty-five employees had awards between $100,000 and $200,000, and five employees had awards exceeding $200,000.

Whether the City will be required to pay these windfall awards is still unsettled. In its most recent opinion in that case, Yourman v. Giuliani, 229 F.3d 124, 129 (2d Cir. 2000), cert. denied, 121 S. Ct. 1362 (2001)(prior history omitted), the Second Circuit upheld the finding that the City did not have policies that created a significant likelihood of deductions, However, the Court of Appeals found that in determining whether there was a practice of deductions, the District Court, inter alia, had improperly simply divided the number of deductions by the number of managerial employees, quoting with disapproval the District Court's statement that "out of 3,708 ... managers, four deductions constitute only 0.1%. This is not sufficient to constitute a practice of deductions." Id. at 130. The Second Circuit vacated the grant of summary judgment to defendants and remanded the case to the District Court for further fact-finding on the practice issue. Id. at 130-131. Thus, there is again a possibility that the City may face massive liability, and that the highly-paid plaintiff-

employees, almost all of whom never experienced any deductions in their pay, may obtain massive windfall awards.

The City's six cases were commenced in the early 1990's. Since then, there has been continuing confusion, and changing standards in the controlling law. As a result, judgments or dispositive orders in all six cases have been actually or effectively vacated, including vacatur of a judgment by the Court, Yourman v. Giuliani, 519 U.S. 1145 (1997).

In all six of its cases, the City has invoked the window of correction provision of the salary basis test, 29 C.F.R. §541.118(a)(6), which is the subject of this appeal. This provision allows an employer to retain the exemption by reimbursing employees whose pay has been deducted in a manner inconsistent with the salary basis regulation and by promising to comply with the regulation in the future. The window of correction provision serves the important purpose of requiring both retroactive and prospective compliance with the salary basis test, while avoiding windfall awards to employees and massive liability for employers.

In Yourman, 229 F.3d at 128, the Second Circuit, relied, inter alia, on a DOL amicus brief in finding that the window of correction provision was not available to an employer who had a policy or practice of docking salary for disciplinary reasons. DOL propounded the same restrictive interpretation in amicus briefs submitted to the Sixth Circuit in Takacs v. Hahn Automotive Corp., 246 F.3d 776, 783 (6th Cir. 2001), and to two other circuit courts, which also adopted DOL's restrictive interpretation.

By contrast, other circuit court decisions, which relied on the plain language of the provision, and since 1997, on the Court's reading of the provision in Auer v. Robbins, 519 U.S. 452 (1997), found that the window of correction

is available if the deductions were not made for lack of work. The amicus City of New York asks that the Court grant certiorari to authoritatively resolve the issue of the proper interpretation of the window of correction provision.

## SUMMARY OF ARGUMENT

The recent restrictive judicial interpretations of the window of correction provision are primarily based on DOL's interpretation, as submitted to these courts in amicus briefs. However, DOL's recent restrictive interpretation of the window of correction provision is inconsistent with: 1) the plain, unambiguous language of the provision; 2) the Court's reading of the provision in Auer, and 3) DOL's own prior interpretation of the provision. DOL's restrictive interpretation is entitled to no deference in these circumstances, and should be rejected.

## REASONS FOR GRANTING THE WRIT

### I. The Petition Should be Granted so that the Court May Decide Whether the Window of Correction Provision Should Be Construed in Accordance with its Plain Language and with the Court's Construction of the Provision in Auer v. Robbins

The window of correction provision of the salary basis test, 29 C.F.R. §541.118(a)(6), states:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for

> reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

In Auer v. Robbins, 519 U.S. 452 (1997), the Court interpreted the window of correction provision in accordance with its plain language. The question was whether the window of correction could be used to preserve the exemption by reimbursing an employee whose pay had been intentionally docked as a disciplinary penalty. The employees contended that the window of correction was unavailable because the deduction was not inadvertent. The Court rejected this argument, relying on "the plain language of the regulation [which] sets out 'inadvertence' and 'made for reasons other than lack of work' as alternative grounds permitting corrective action." Id. at 463.

In Takacs, 246 F.3d at 782, the Sixth Circuit concluded that the window was not available if there was a policy or practice of disciplinary pay docking. In reaching this conclusion, the Sixth Circuit relied on a DOL opinion submitted in an amicus brief. Contrary to the DOL opinion, the reasoning in Auer indicates that the window of correction is available in these circumstances. The plain language construed in Auer, as permitting corrective action when a deduction is either inadvertent or made for reasons other than lack of work, is in the fourth sentence of the provision. The sentence begins "On the other hand...." and then goes on to describe the deductions that may be corrected. The plain meaning of this introductory phrase is to contrast what follows the phrase (deductions that may be corrected) with what precedes the phrase (deductions that may not be corrected). The deductions that may not be corrected are described in the second and third sentences of the provision: "Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a

case the exemption would not be applicable to him during the entire period when such deductions were being made." Thus, the plain language of the regulation provides that a general practice of making deductions based on lack of work is *not* correctable, whereas deductions made for reasons other than lack of work are correctable.

Following Auer, several circuit courts issued decisions which relied on the Court's reading of the window of correction provision, in construing the provision as allowing the correction of disciplinary deductions, whether or not there was a policy or practice of deductions, since the deductions were made for reasons other than lack of work. In Paresi v. City of Portland, 182 F.3d 665 (9th Cir.), cert. denied, 528 U.S. 1133 (1999), the Ninth Circuit found that there was no policy or practice, but also rejected the employees' argument that the window is unavailable when there is a policy or practice of disciplinary deductions:

> ...the text of the regulation contains no such limitation. "The plain language of the regulation sets out 'inadvertence' and 'made for reasons other than lack of work' as alternative grounds permitting corrective action." Auer v. Robbins, 519 U.S. 452, 463 [other citations omitted]. The deductions made and corrected by the City were made for disciplinary reasons, which are "reasons other than lack of work" and, thus are covered by the window of correction.

Id. at 668.

In DiGiore v. Ryan, 172 F.3d 454 (7th Cir. 1998), there were five instances of improper docking. The Seventh Circuit stated that, "[e]ven if these five incidents rose to the level of frequent and, thus, constituted an actual practice by the SOS officials, the officers would still be exempt from the FLSA because the SOS officials availed themselves of the regulatory 'window of correction.'" Id. at 464. In Davis v. City of Hollywood, 120 F.3d 1178, 1180 (11th

Cir. 1997), the Eleventh Circuit found that the window of correction was available to repay six employees who experienced disciplinary dockings, because the dockings were made for reasons other than lack of work.

In Balgowan v. New Jersey Department of Transportation, 115 F.3d 214 (3d Cir. 1997), the Third Circuit also found that Auer authorized broad use of the window of correction:

> As a final note, the Supreme Court in Auer stated that the salary test's "window of corrections," [sic] 29 C.F.R. §541.118(a)(6), is available to preserve the exempt status of employees who have been subjected to pay deductions inconsistent with the salary-basis test. The Court emphasized that the employer could reimburse employees not only if the deductions were 'inadvertent' but also if they were "made for reasons other than lack of work." *Auer, 117 S. Ct. at 912* (quoting 29 C.F.R. §541.118(a)(6)(alteration added)). Accordingly, if any DOT engineer's pay had been docked, the window of correction could have been used by the State to preserve that engineer's exempt status.

Id. at 219.

These post-Auer decisions are consistent with interpretations of the window in many of the pre-Auer decisions (although there was a split in the circuits on this issue prior to Auer)[1]. In International Association of Fire

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[1] Pre-Auer cases that held to the contrary were largely based on the conjunctive reading of the provision (requiring that deductions be inadvertent as well as made for reasons other than lack of work) that was rejected in Auer, 519 U.S. at 463. See, e.g., Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 616 (2d Cir. 1991), cert. denied, 506 U.S. 905 (1992);

Fighters v. City of Alexandria, 720 F. Supp. 1230, 1232 (E.D.Va., 1989), aff'd on opn. below, 912 F.2d 463 (4th Cir. 1990), there were twenty-six dockings pursuant to policies which permitted this practice. The Fourth Circuit held that the window of correction could be utilized to reimburse the employees since the City had also changed its policies and promised to comply in the future. In Lee v. Flightsafety Services Corp., 20 F.3d 428 (9th Cir. 1994), deductions were made *whenever* employees did not work their full weekly schedule. The Ninth Circuit held that the window could be utilized since the deductions were made for reasons other than lack of work. "The regulation is clearly written in the disjunctive, so either circumstance [inadvertence or other than lack of work] suffices." Id., at 433.

Similarly, in Kuchinskas v. Broward County, 840 F. Supp. 1548 (S.D. Fla., 1993), aff'd, 86 F.3d 1168 (11th Cir. 1996), cert. denied, 519 S. Ct. 1148 (1997), seventy-three out of 2,000 employees had impermissible salary dockings, and the lower courts held that the County employer could use the window of correction to maintain the exemption. The Court denied certiorari in Kuchinskas, on the same date that it vacated the judgments in several other cases, in light of Auer.

Contrary to these circuit court opinions, in Klem v. County of Santa Clara, 208 F.3d 1085, 1090 (9th Cir. 2000), DOL submitted an amicus brief in which it opined that the window of correction "is available only to employers that have demonstrated the 'objective intention' to pay their employees on a salaried basis," and that an employer that has a practice of making impermissible deductions, or a policy that effectively communicates that such deductions

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Spralding v. City of Tulsa, 95 F.3d 1492, 1503 (10th Cir. 1996), cert. denied, 519 U.S. 1149 (1997).

will be made, "necessarily has no intention of paying its employees on a 'salary basis.'" Id. at 1091. Klem also involved disciplinary deductions. For textual support, DOL focused on the second and third sentences of the provision: "Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made." As summarized by the Ninth Circuit:

> In the Secretary's view, that passage establishes that an employer's intention to pay on a salaried basis is a prerequisite to its treating an employee as exempt. An employer's lack of intention to pay on a salaried basis may be shown by deductions when no work is available, as provided in the text of the rule, or by a practice of other impermissible deductions, as in this case.

Id.

However, as the Ninth Circuit noted, the passage relied on by DOL does not refer to any circumstance precluding use of the window of correction other than deductions generally made when no work is available. In Auer, the Court found that the plain language of the fourth sentence provides that deductions are correctable if they are made for reasons other than lack of work. DOL's interpretation of the second and third sentences is inconsistent with the plain language of the fourth sentence, as construed in Auer. If deductions made for reasons other than lack of work are correctable, pursuant to the fourth sentence, and the second and third sentences refer to deductions not being correctable when they are generally made for lack of work, then the plain language of the provision, when read in its entirety, provides that deductions are correctable, unless they are made for lack of work.

The Ninth Circuit strongly suggested that it did not find DOL's interpretation compelling, but was nevertheless deferring to DOL.

> Because of the high degree of deference owing to the Secretary's interpretation of her own rules, we need not conclude that her interpretation is the only reasonable construction of that rule, or even the best one. It merely must be sufficiently connected to the rule's text to be consistent with the rule. Id. at 1093.

In Klem, the Ninth Circuit also held that it was not bound by its own prior conclusion in Paresi, that the text of the regulation allows corrections whenever deductions are made for reasons other than lack of work, and that the window of correction may therefore be used when there is a practice or policy of deductions. Id. at 1094. Klem held that this conclusion in Paresi was dicta. Significantly, the Ninth Circuit also distinguished Paresi on the ground that Paresi was based on the text of the regulation, rather than on DOL's interpretation.

> The discussion in Paresi focused exclusively on the wording of the regulation and did not address the issue before us, which is whether the Secretary of Labor's interpretation should be given deference. The Secretary of Labor did not file an amicus brief in Paresi, and this court did not have before it a sufficient indication of what the Secretary's interpretation was. See *Paresi, 182 F.3d at 668, n.2.*

Id.

In the year following the decision in Klem, DOL has submitted amicus briefs concerning, inter alia, the window of correction issue, to three other circuit courts. In each instance, the circuit court has followed Klem, and deferred

to DOL's interpretation of the window of correction. Yourman, 229 F.3d at 128; Takacs, 246 F.3d at 781-84; Whetsel v. Network Proper Services, LLC, 246 F.3d 897 (7th Cir. 2001). (The Ninth Circuit also issued another decision following Klem. Block v. City of Los Angeles, 253 F.3d 410 (9th Cir. 2001).

Whetsel is similar to Klem in several noteworthy respects. First, to uphold DOL's interpretation, the Seventh Circuit had to overrule its own prior post-Auer precedent, DiGiore, 172 F.3d at 465. After deciding that DiGiore held that the window of correction was available to correct a practice of disciplinary deductions, the Seventh Circuit overruled that holding. Whetsel, 246 F.3d at 904. As a further indication of the degree to which its ruling was based on deference to DOL's opinion, the Seventh Circuit noted that DiGiore does not mention DOL's interpretation, "which suggests that the court might not have had that argument before it." Id. at 903. Whetsel also suggests that DOL's interpretation is not very persuasive.

> We emphasize that the question is not which interpretation of § 541.118(a)(6) is best or most natural, but only whether the Secretary's construction is reasonable. See *Pauley, 501 U.S. at 702; Klem, 208 F.3d at 1092-93.* While one may argue that the Secretary's interpretation is strained, it sufficiently comports with the language of the regulation so as not to be declared unreasonable or plainly erroneous.

Id. at 902-03.

Thus, the recent case law on the window of correction provision has been largely based on a DOL interpretation, which even some of the circuit courts that have deferred to DOL, have found less than compelling and probably not the best or most natural interpretation of the provision. However, the circuit courts have indicated that they believe

themselves required to give a high degree of deference to DOL's interpretation of its own regulation.

It is submitted that deference to DOL is not appropriate here. Courts are not required to give deference to an administrative agency's interpretation of its own regulation, if the interpretation is "plainly erroneous or inconsistent with the regulation" (internal quotation marks omitted), Auer, 519 U.S. at 461. DOL's interpretation is inconsistent with the regulation for the reasons discussed above. In addition, the regulation explicitly states that the window is available even if more than one deduction has been made from a single employee: "the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." (emphasis supplied). Nevertheless, in its amicus briefs, DOL has taken the position that the window of correction is available for the correction of one-time or inadvertent deductions.

Further, courts are not required to defer to an agency's interpretation unless the regulation is ambiguous. Christensen v. Harris County, 529 U.S. 576, 588 (2000). In Auer, 519 U.S. at 463, the Court found that the window of correction provision's "plain language" allows correction of deductions made for reasons other than lack of work. This indicates that the language in the fourth sentence being construed in Auer was not ambiguous. Nor is ambiguity found in the language of the preceding (second and third) sentences of the regulation, which is consistent with the unambiguous language of the fourth sentence. As discussed above, the circuit courts that examined the regulation in light of the Auer opinion (apparently without consideration of DOL's opinion), concluded that the text of the regulation clearly and without qualification permitted correction of disciplinary deductions, since they were not deductions made for lack of work. This unambiguous language cannot be made ambiguous by DOL's reading terms into the regulation that are not contained therein.

**II. DOL's Current Interpretation of the Window of Correction is Not Consistent with its Earlier Opinions concerning the Preservation of the Exemption and this is Another Reason why the Agency's Opinion is Not Entitled to Deference.**

DOL's recent restrictive interpretation of the window of correction provision is also not entitled to deference, because it is not consistent with the agency's prior interpretations. General Electric Co. v. Gilbert, 429 U.S. 125, 143 (1976); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

DOL's recent interpretation is that the window of correction is available for the correction of one-time or inadvertent deductions, and that if deductions are not one-time or inadvertent, the exemption is unavailable for *all* employees in the category, for the entire period during which such deductions were permitted. This is simply inconsistent with the interpretation found in prior DOL opinion letters. In a January 1986 opinion letter, DOL recognized that the exemption was preserved even though *multiple* deductions were made from the pay of a *single* employee, provided the deductions were occasional:

> Where an *occasional* deduction that is not permitted by section 541.118 is made *from the salary of an otherwise exempt employee*, the exemption would be lost in that workweek when the deduction is made. However, if such deductions are regular and recurring we would question whether the employee is actually paid "on a salary basis" and the exemption may be denied in all workweeks in which it is claimed, including those weeks when no deductions are made. (emphasis supplied).

United States Department of Labor, Wage and Hour Opinion Letter (Jan. 15, 1986), available at Ginsburg, et al.,

Fair Labor Standards Handbook (1998), App. III, Administrative Rulings, 39.

Compare DOL's 1986 interpretation, that multiple "occasional" deductions from the pay of a single employee does not lead to the loss of the exemption (except in the weeks the employee is docked), with its present interpretation, that the window of correction is available when there is a "one-time deduction" in pay. DOL's current interpretation further provides that if the one-time deduction requirement is not satisfied, this indicates an intention not to pay employees on a salaried basis, and the consequences are that the window of correction is unavailable and also that the exemption is unavailable for *all* employees in the category. As described in the petition for certiorari, at 16, in Takacs, pursuant to DOL's current restrictive interpretation, a deduction from the pay of each of seven employees, out of over four hundred employees in the category, is not correctable and causes unavailability of the exemption. Thus, under DOL's current interpretation, approximately four hundred employees who experienced no deductions whatsoever, and who constitute approximately 98% of the employees, also lose the exemption. DOL's 1986 and current interpretations and the effects of these interpretations are simply not consistent.

A July 17, 1987 DOL opinion letter is even more clearly inconsistent with DOL's present interpretation. In the 1987 opinion letter, DOL advised an employer that it could dock the salary of exempt employees[2] during approximately seven different weeks over a two-year period, when the employees attended collective bargaining negotiations. DOL stated that the employees would be

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[2] The number of affected employees is not stated in the opinion letter, but the affected employees are referred to in the plural.

treated as non-exempt during the seven weeks in which their salaries were docked, but that this would not affect these employees' exempt status in other weeks when the employees are paid on a salary basis. United States Department of Labor, Wage and Hour Opinion Letter (July 17, 1987), 1987 WL 467862.

Thus, as of July 1987, DOL took the position that the docking of each of apparently several employees' pay, seven times over a two-year period, were "occasional" deductions that do not rise to the level of "regular and recurring" deductions. Although these were neither one-time nor inadvertent deductions, the employees did not lose the exemption (except for the weeks in which they were actually docked pay). Again, this is simply inconsistent with DOL's present interpretation, and leads to inconsistent results. Under DOL's present interpretation, not only the employees who attended the negotiations and were docked pay, but all other employees in their category, would lose the exemption, for at least the entire two-year period over which docking occurred. By contrast, pursuant to the July 1987 opinion letter, the exemption would have been preserved for the employees in Takacs.

Thus, DOL has recently interpreted the window of correction provision, and the preservation of the exemption, far more narrowly and restrictively than it did in earlier opinions. As seen in its amicus briefs in Klem and Auer, in which these prior opinion letters are not mentioned, DOL has not tried to explain nor has it even acknowledged this change in its position. Further, DOL has narrowed its interpretation despite unprecedented confusion and conflicting decisions concerning the standards for compliance with the salary basis test in recent years. Under these circumstances, DOL's recent restrictive interpretation is not only inappropriate, it is also likely to lead to massive liability for employers and windfall awards for highly-paid employees.

In summary, DOL's recent interpretation should not be given deference because it is not consistent with the plain language of the window of correction provision nor with the Court's reading of the provision in Auer, it is not based on an ambiguous regulation, and it is not consistent with DOL's prior interpretations.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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